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91-1906

No.

Supreme Court, U.S.
FILED
MAY 29 1992
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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FERRELLGAS, INC.,

*Petitioner,*

v.

CURTIS S. ASHWAY,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Date: May 29, 1992

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## QUESTION PRESENTED

To avoid liability to a sexual harassment victim, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, requires an employer to investigate and, if it believes in good faith that the harassment allegations are true, to take appropriate corrective action. To avoid liability to the alleged harasser for the corrective action taken, can state law, consistent with Title VII's "good faith" standard for taking action, impose a higher "cause in fact" standard in a wrongful discharge action for termination without just cause?

## PARTIES

The Petitioner is Ferrellgas, Inc. ("Ferrellgas" or the "Company"). Ferrellgas is the successor-in-interest to Buckeye Gas Products Company ("Buckeye"). Although named as a Defendant in the District Court, Buckeye no longer existed as a separate entity. It is not a party to this action. "John Does I through V" also were named as Defendants, but were dismissed prior to removal of this case to the District Court. John Does I through V are not parties to this action.

The Respondent is Curtis S. Ashway ("Ashway").

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| I. Preliminary Statement | 3 |
| II. Background | 4 |
| III. Procedural History | 8 |
| A. The Decision Of The District Court | 8 |
| B. The Decision Of The Court Of Appeals | 8 |
| REASONS FOR GRANTING THE WRIT | 10 |
| I. Importance Of The Question | 10 |
| A. The Conflict Between Federal and State Good Faith Belief And Cause In Fact Standards On Employer Liability With Respect To The Title VII Imposed Duty To Take Corrective Action Must Be Resolved | 10 |
| 1. The Title VII Good Faith Belief Standard | 13 |
| 2. The State Wrongful Discharge Cause In Fact Standard | 14 |
| 3. The Conflict Between The Federal Good Faith Belief And The State Cause In Fact Standards Creates An Untenable Dilemma For Employers | 16 |
| B. Uniformity And Guidance Regarding The Interplay Of Title VII And State Law Of Wrongful Discharge Is Necessary To Avoid Undermining Important Goals of Title VII | 18 |

C. The Ninth Circuit Opinion Conflicts With The *Garziano* Opinion From The Fifth Circuit, The *Crimm* Opinion From The Eighth Circuit And An Increasing Number of District Court Opinions ..... 20

1. The Conflict With *Garziano v. E.I. DuPont de Nemours & Co.* ..... 20

2. The Conflict With *Crimm v. Missouri Pacific Railroad Company* ..... 21

3. Conflict With Other District Court Cases ..... 22

II. The Good Faith Belief Standard Under Title VII Preempts The Cause In Fact Standard Under State Law ..... 24

CONCLUSION ..... 27

APPENDIX

Opinion Dated May 14, 1991 of the United States Court of Appeals for the Ninth Circuit Affirming Summary Judgment ..... 1a

Order dated August 7, 1991 of the United States Court of Appeals for the Ninth Circuit Reversing in Part ..... 10a

Order dated March 2, 1992 of the United States Court of Appeals for the Ninth Circuit Denying Ferrellgas' Petition for Rehearing ..... 12a

Opinion dated April 20, 1989 of the District Court for the District of Arizona Granting Summary Judgment ..... 13a

Order dated December 4, 1989 of the United States District Court for the District of Arizona Denying Ashway's Motion for New Trial or Amendment of Judgment ..... 24a

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Equal Employment Opportunity Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11; and, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-7 and 2000h-4 ..... 27a

Statement of Facts in Support of Defendant's Motion for Summary Judgment on Plaintiff's Complaint and/or to Dismiss, No. 12 from the Clerk's record in Appellee's Supplemental Excerpts of Record filed in the Ninth Circuit Court of Appeals ..... 30a

Brief of the Equal Employment Opportunity Commission As *Amicus Curiae* In Support of Defendant's Motion for Summary Judgment in *Stockley v. AT&T Info. Sys., Inc.*, 687 F.Supp. 764 (E.D.N.Y. 1988) ..... 48a

## TABLE OF AUTHORITIES


| CASES: | Page |
|---|---|
| *Adams v. Frontier Airlines Fed. Credit Union*, 691 P.2d 352, 354 (Colo. Ct. App. 1984) | 15 |
| *Baldwin v. Sisters of Providence in Washington, Inc.*, 769 P.2d 298, 304 (Wash. 1989) | 14 |
| *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984) | 12 |
| *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) | 12 |
| *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Local 54*, 468 U.S. 491, 501 (1984) | 25 |
| *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) | 3,11 |
| *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) | 26 |
| *Coley v. Consol. Rail Corp.*, 561 F. Supp. 645, 651 (E.D. Mich. 1982) | 11 |
| *Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703 (8th Cir. 1984) | 12,20,21,22 |
| *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) | 17 |
| *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) | 25 |
| *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959) | 26 |
| *Feldleit v. Long Island R.R.*, 723 F. Supp. 892 (E.D.N.Y. 1989) | 23 |
| *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) | 25 |
| *Ford v. Revlon Inc.*, 734 P.2d 580 (Ariz. 1987) (In Banc) | 10 |
| *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) | 12,20,21 |

## Table of Authorities Continued


| | Page |
|---|---|
| *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210 (1824) | 25 |
| *G&M Employment Service, Inc. v. Commonwealth*, 265 N.E.2d 476, 480 (Mass. 1970), *appeal dismissed*, 402 U.S. 968 (1971) | 14 |
| *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) | 16 |
| *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) | 3,11 |
| *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) | 25 |
| *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494-97 (1987) | 26 |
| *Johnson v. Int'l Minerals & Chem. Corp.*, 1986 WL 8415 (W.D.S.D. 1986) | 12,22,23 |
| *Loffa v. Intel Corp.*, 738 P.2d 1146 (Ariz. Ct. App. 1987) | 10 |
| *Lukasic v. Riddell, Inc.*, 452 N.E.2d 55, 60 (Ill. App. Ct. 1983) | 15 |
| *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) | 3,11 |
| *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977) | 11,14 |
| *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) | 25 |
| *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990) | 15 |
| *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-47 (1959) | 25,26 |
| *Scherer v. Rockwell Int'l Corp.*, 766 F. Supp. 593 (N.D. Ill. 1991) | 12,14,22 |
| *Simpson v. W. Graphics Corp.*, 643 P.2d 1276, 1277-79 (Or. 1982) (en banc) | 14 |
| *Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764 (E.D.N.Y. 1988) | 12,13,18,19,20,22 |

## Table of Authorities Continued


| | Page |
|---|---|
| *Tomkins v. Pub. Service Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977) | 3,11 |
| *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 895-97 (Mich. 1980) | 15 |
| *Video Elec., Inc. v. Tedder*, 470 So.2d 4, 6 (Fla. Dist. Ct. App. 1985), *aff'd* 491 So.2d 533 (Fla. 1986) | 15 |
| *Watts v. New York City Police Dept.*, 724 F. Supp. 99, 107 (S.D.N.Y. 1989) | 11 |
| *Wilkerson v. Wells Fargo*, 212 Cal. App. 3d 1217, 1230-31 (1989) | 15 |
| *Willis v. Ideal Basic Indus. Inc.*, 484 So.2d 444 (Ala. 1986) | 12 |
| *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) | 12,16 |
| **STATUTES:** | |
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 1291 | 2 |
| 28 U.S.C. § 1332 | 2 |
| Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* | 21 |
| Civil Rights Act of 1964 | |
| Title VII, 42 U.S.C. §§ 2000e, *et seq.* | 2 |
| 42 U.S.C. § 2000e-2 | 3,10 |
| 42 U.S.C. § 2000e-7 | 3,26 |
| 42 U.S.C. § 2000h-4 | 3,26 |
| Civil Rights Act of 1991, Pub. L. No. 102-166, Nov. 21, 1991, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) | 19 |
| **REGULATIONS:** | |
| Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11 | 3 |

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioner Ferrellgas, Inc. prays that a Writ of Certiorari issue to review the Judgment, Opinion and Order of the United States Court of Appeals for the Ninth Circuit reversing Summary Judgment in favor of Ferrellgas and holding that cause in fact for termination, rather than Title VII's good faith belief for corrective action, must be proven in order for an employer to avoid liability for wrongful discharge under Arizona law.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming Summary Judgment entered May 14, 1991, the Order dated August 7, 1991 reversing it in part, and the Order dated March 2, 1992 denying Ferrellgas' Petition for Rehearing are unreported and are reprinted in the appendix, pp. 1a, 10a and 12a, *infra,* respectively.

The Opinion of the United States District Court for the District of Arizona dated April 20, 1989 granting Ferrellgas Summary Judgment and the District Court's Order dated December 4, 1989 denying Ashway's Motion for New Trial or Amendment of Judgment, also unreported, are reprinted in the appendix, pp. 13a and 24a, *infra*, respectively.

## JURISDICTION

The United States District Court for the District of Arizona had diversity jurisdiction under 28 U.S.C. § 1332. The District Court entered its final Judgment granting Summary Judgment in favor of Ferrellgas on December 4, 1989. On December 29, 1989, Ashway timely appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291.

The Judgment of the Ninth Circuit Court of Appeals, affirming the District Court's Judgment, was entered on May 14, 1991. Ashway filed a timely Petition for Rehearing with Suggestions for Rehearing en banc on May 29, 1991. The Ninth Circuit granted Ashway's Motion in part on August 7, 1991. Ferrellgas then filed a timely Petition for Rehearing with Suggestions for Rehearing en banc on August 20, 1991. The Ninth Circuit denied Ferrellgas' Petition for Rehearing and rejected its Suggestions en banc on March 2, 1992. This Petition for Certiorari, thus, is timely. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

This Petition involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*, ("Title VII"),

particularly § 2000e-2 which prohibits employment discrimination on the basis of sex, including sexual harassment. Also involved are Equal Employment Opportunity Commission ("EEOC") regulation 29 C.F.R. 1604.11 which requires an employer to investigate employee complaints of sexual harassment and Title VII preemption provisions, § 2000e-7 and § 2000h-4. Pertinent sections of Title VII and the EEOC regulations appear in the appendix, p. 27a, *infra*.

## STATEMENT OF THE CASE

### I. Preliminary Statement

Title VII of the Civil Rights Act of 1964[1] prohibits sexual harassment in the workplace. This Court has held that employers have an affirmative duty under Title VII to eradicate work environments that are hostile or offensive because of sexual harassment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). This duty mandates employers to investigate and take corrective action in response to the allegations of sexual harassment. *See, e.g., Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Tomkins v. Pub. Service Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). Failure to either investigate or take corrective action will result in liability to the victim under Title VII. *Id.*

No court, including this Court, has spoken to the appropriate standard for an employer's decision to take corrective action in order to avoid *both* Title VII liability to the victim *and* state wrongful discharge

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[1] 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e, *et seq.*

liability to the alleged harasser. Whether the correct standard should be the employers' good faith belief that the allegations are true, as under Title VII and some states, or whether cause in fact is required, as under the law of other states and the Ninth Circuit Opinion, is squarely presented by this Petition.

**II. Background**

Ferrellgas is a national distributor of propane gas. Ferrellgas acquired Buckeye in December, 1986. At the time Ashway was terminated, he was employed by Buckeye.[2] Ashway, District Manager in Phoenix, Arizona, was terminated on December 1, 1986 because of the Company's belief that Ashway had sexually harassed a co-worker, Sharon Tye ("Tye").

Tye, a secretary, worked in the same building as Ashway. One evening in November, 1986, the Company's Division Operations Manager discovered Tye crying in the mail room. The Operations Manager questioned Tye about her distress. Tye revealed that Ashway had grabbed her and referred to himself as "the hottest thing in town." The following day this information was reported to the Personnel Director who immediately began an investigation into Tye's allegations.

The Personnel Director learned from Tye that her encounter that evening was not isolated. Ashway had been exhibiting offensive sexual conduct toward her for several weeks. Tye described Ashway's conduct

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[2] Ferrellgas is the successor-in-interest to Buckeye's employment relationships and, therefore, for brevity, will be referred to as Ashway's employer. The background facts in Section II. are contained in the appendix, p. 30a, *infra*.

in the following written statement which she submitted to the Personnel Director.

11/21/86

Dear Mr. Cahill,

This letter is in regards to our telephone conversation this morning concerning the conduct of Curtis Ashway, Phoenix District Manager. Curtis, on many occasions has been vulgar in our Phoenix Division Office. He is much worse when both Gil Johnston, Division Manager, and John Jonescu, Operations Manager, are out of the office. I felt at first when he started this that I could take care of it myself or handle it somehow. However, the angrier I became, the worse he became. If I tried to just ignore it, he only became more sexually explicit. When I first came here to the Division office in July of this year, I didn't know Curtis at all. At first he only flirted. Then, as I was here a little longer, he became more and more personal. He was coming into the office constantly and telling me about his date the night before. I told him that I was not the least bit interested in his personal affairs. This only seemed to cause him to become more detailed about what he did on his date. (How fabulous he or she was and what sexual acts were actually committed). When I continued to explain that I was not interested and that I thought he was sick, he said, "Doesn't this get you excited! What is the matter with you?" The visits became more and more fre-

quent. If I locked the door between the offices, he would just stand and knock loudly on it until I opened it. These visits were starting to become regular. He started one day early in the morning dancing in front of my desk in a suggestive way and whooping and hollering. When I asked him to stop, he started telling me about the hot date he'd had with two girls at once and how good it was and the type of sexual acts which were performed. When I told him I was busy, and to please shut up and leave, he said, "Honey, you aren't dead. I have the best in town and I could make you feel differently." I told him I was very content and did not need *HIM*! He just laughed and walked out. These probably started happening at least 3 times a week. Now, he comes in grabbing or rubbing the front of his pants and telling me that "this is the hottest thing in town, and I'm sorry if you don't want it!" I have ignored him, I have told him to stop his nonsense and grow up, I have yelled at him to leave me alone so I could work, and absolutely nothing seems to deter him. I finally became frustrated and reported it. He just will not stop - I feel as if there is some kind of conquest being taken on by him toward me. He cannot accept the fact that he does not "turn me on." He will not accept defeat and therefore he stands in front of my desk and holds himself or rubs himself and says, "I'm so horny I can't stand it." "Doesn't what I say and do get you hot?!" My constant reply is "No - Grow up!"

s/Sharon Tye
Phoenix Division Secretary

The Personnel Director discussed Tye's complaints with John Jonescu, the Division Operations Manager who had found Tye crying, with Robert Hetzler, the Company's Southwest Regional Manager, and with Gil Johnston, Ashway's supervisor who was also Tye's boss. Each of these individuals indicated that although they had never witnessed the conduct they had not observed any behavior by Tye that they believed would have provoked the reported incidents. No eye witnesses were discovered.[3]

The Personnel Director also discussed the matter with the Company's Vice-President and corporate counsel. They advised that, given the severity of Ashway's alleged conduct, Ashway should be terminated because of the Company's obligations under Title VII unless Ashway, when confronted, provided a satisfactory response to Tye's charges.

Hetzler was given the final authority to decide whether to terminate Ashway based on Ashway's response to the accusation. Hetzler confronted Ashway who denied the allegations. "From the look on [Ashway's] face," Hetzler believed that Ashway was lying. Appendix, p. 45a. Unable to offer any supporting

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[3] Corroborating evidence was discovered, however. Hetzler's secretary submitted a written statement to the Personnel Director indicating that Tye had told her about Ashway's sexual harassment and that she had encouraged Tye to report Ashway but Tye was afraid to do so. Hetzler's secretary also reported that a former female employee had told her that Ashway routinely described his sexual activities to her in great detail, much as Tye stated Ashway did to her. The Company was unable to locate this individual. *See* appendix, p. 43a, *infra*.

evidence on his behalf, Ashway was given the option of either submitting his resignation or being terminated. He was terminated.

## III. Procedural History

### A. The Decision Of The District Court

Ashway filed a wrongful discharge action against Ferrellgas under Arizona law.[4] Ashway's suit contained four counts: wrongful termination based on the implied covenant of good faith and fair dealing and the public policy exception to at-will employment; negligent supervision; defamation; and, breach of implied contract which is at issue here.

After extensive discovery, Ferrellgas sought and obtained Summary Judgment on all four counts. Appendix, p. 13a. In granting Summary Judgment, the District Court concluded that the Company's investigation of the allegations of sexual harassment was adequate as a matter of law and, with respect to the defamation claim, that a qualified privilege applied to Ferrellgas as it fulfilled its Title VII obligations which privilege Ferrellgas had not exceeded. Appendix, pp. 21a, 22a. Ashway appealed.

### B. The Decision Of The Court Of Appeals

Ashway limited his appeal to the public policy exception, negligent supervision and implied contract

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[4] Ashway filed his suit in Arizona State Court. On November 2, 1988, following the dismissal with prejudice of John Does I-V, Ferrellgas removed the case to the United States District Court for the District of Arizona ("District Court") based on diversity jurisdiction. Ashway is a citizen of Arizona. Ferrellgas is a citizen of Delaware, its place of incorporation, and Missouri, its principal place of business.

claims. The Ninth Circuit, in a divided decision, affirmed the District Court's grant of Summary Judgment. With respect to the negligence and public policy claims, it concluded that the Company's investigation was adequate as a matter of law. Appendix, p. 4a. On the just cause implied contract claim however, the Court, having overlooked an Affidavit of Ashway denying the allegations, concluded that Ashway had failed to raise a material question of fact with regard to just cause. Appendix, pp. 7a, 8a, *infra*.

Ashway petitioned for rehearing based on his Affidavit denying the allegations. The Ninth Circuit thereupon reversed its affirmance of Summary Judgment on the just cause implied contract claim, and held (1) that cause in fact was required by Arizona law, and, (2) given Ashway's Affidavit, that a question of fact existed on cause. Appendix, p. 8a.

Ferrellgas filed a Petition for Rehearing (with Suggestions for Rehearing en banc) arguing that the Ninth Circuit's finding that Arizona law required cause in fact created employer liability for the good faith fulfillment of Title VII obligations to investigate and eradicate sexual harassment from the workplace. Previously, an employer faced liability only to the victim for failing to fulfill its obligation to investigate allegations of sexual harassment and take appropriate corrective action if the employer believed the allegations to be true. The Ninth Circuit's holding, however, thrust the employer into an untenable dilemma. In avoiding Title VII liability to the complainant, the employer now faced possible liability to the accused for a termination based upon a good faith belief that sexual harassment occurred.[5]

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[5] Ferrellgas also argued that requiring cause in fact is incon-

The Ninth Circuit rejected these arguments reaffirming its determination that Arizona law requires cause in fact rather than a good faith belief to support corrective action taken by the employer. Thus, Ferrellgas' Petition for Rehearing (and Suggestions en banc) was denied by the Ninth Circuit on March 2, 1992.[6] Appendix, p. 12a.

## REASONS FOR GRANTING THE WRIT

### I. Importance Of The Question

#### A. The Conflict Between Federal and State Good Faith Belief And Cause In Fact Standards On Employer Liability With Respect To The Title VII Imposed Duty To Take Corrective Action Must Be Resolved

Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer. . .to discriminate against any individual with respect to his compensation,

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sistent with the Ninth Circuit's conclusion that the investigation which resulted in the good faith belief was adequate as a matter of law. Under the Ninth Circuit's holding, an employer could be liable under state law for corrective action taken (discharge) upon the employer's good faith belief that sexual harassment allegations were true even though that belief resulted from an investigation which was adequate as a matter of law.

[6] Ferrellgas believes the Ninth Circuit's decision that Arizona law requires cause in fact is erroneous. No Arizona case is directly on point, however, *Loffa v. Intel Corp.*, 738 P.2d 1146 (Ariz. Ct. App. 1987) lends strong support for the proposition that cause in fact is not required under Arizona law. Moreover, the Arizona Supreme Court highlighted Arizona's strong public policy to rid the workplace of sexual harassment in *Ford v. Revlon Inc.*, 734 P.2d 580 (Ariz. 1987) (In Banc) by recognizing a cause of action by the victim for intentional infliction of emotional distress for the employer's failure to promptly redress such conduct. This is a reason in addition to those set forth, *infra*, for granting the writ.

terms, conditions, or privileges of employment, because of such individual's. . .sex. . . ." 42 U.S.C. § 2000e-2(a)(1). This Court definitively stated in *Meritor Savings Bank, FSB v. Vinson* that the Title VII prohibition against sex discrimination includes a prohibition against sexual harassment in the workplace. The prohibition extends to conduct that unreasonably interferes with an individual's work performance or creates a hostile or offensive work environment. *Meritor*, 477 U.S. at 65.

Although *Meritor* did not set forth specific rules for employer liability, it confirmed case law holding that an employer is liable to the victim of harassment if it fails to meet either of its Title VII imposed duties to investigate allegations of sexual harassment or take appropriate corrective action to remedy the harassment.[7] The employer also is liable to the victim if the corrective action is inappropriate.[8]

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[7] *See, e.g., Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (employer violates Title VII if it fails to take prompt remedial action after it knows or should know of the sexual harassment); *Tomkins v. Pub. Service Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977) (Title VII violated when an employer does not take prompt and appropriate remedial action after acquiring knowledge of sexual harassment);*Watts v. New York City Police Dept.*, 724 F.Supp. 99, 107 (S.D. N.Y. 1989); *Coley v. Consol. Rail Corp.*, 561 F. Supp. 645, 651 (E.D. Mich. 1982) (once an employer receives notice of possible harassment, the employer has a "duty to investigate the complaint of sexual harassment and to take prompt remedial action"); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977) (employer has an affirmative duty to investigate complaints of sexual harassment and to deal appro-

Termination is not required by Title VII,[9] however, in many instances, especially where the conduct is egregious,[10] termination is the most effective and appropriate corrective action available to eradicate sexual harassment from the workplace. In these situations, the employer risks a challenge from the discharged employee under various state common law theories that the termination was unlawful.[11]

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priately with the offending personnel - "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior").

[8] *See, e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (employer liable for failure to take remedial measures); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (employer liable for failure to take action remedying the harassment).

[9] *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984).

[10] *See e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989) (holding that an "employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made.") The employer must respond to the situation as a reasonable person would under similar circumstances. It follows that the greater the misconduct or the more egregious the sexual harassment, the greater and more severe the employer's corrective action may reasonably be.)

[11] *See, e.g., Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (defamation); *Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703 (8th Cir. 1984) (age discrimination); *Scherer v. Rockwell Int'l Corp.*, 766 F. Supp. 593 (N.D. Ill. 1991) (breach of covenant of good faith and fair dealing and defamation); *Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764 (E.D.N.Y. 1988) (defamation); *Johnson v. Int.l Minerals & Chem. Corp.*, 1986 WL 8415 (W.D.S.D. 1986) (breach of employment agreement, defamation, and intentional infliction of emotional distress); *Willis v. Ideal Basic Indus. Inc.*, 484 So.2d 444 (Ala.

To avoid liability to the complainant, the employer must satisfy its federally mandated duties to investigate and take action. However, in fulfilling those duties the employer may risk liability to the alleged harasser under state law. As this case demonstrates, that risk will vary substantially depending upon whether a good faith or cause in fact standard is applied in reviewing the employer's action. This case demonstrates further that a substantial conflict exists between the standard applied under Title VII for taking corrective action (good faith belief) and that applied in some states in wrongful discharge actions by the alleged harasser (cause in fact).

**1. The Title VII Good Faith Belief Standard**

Once the employer forms a good faith belief that the sexual harassment allegations are true, an affirmative Title VII duty arises to take corrective action. *Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764 (E.D. N.Y. 1988). A good faith belief standard, thus, creates the employer's duty to act.

A good faith belief standard is a lesser standard than a determination that the allegations are true in fact (a cause in fact standard). The duty to take corrective action upon a good faith belief, therefore, arises *before* a subsequent fact finder determines that the allegations are in fact true. Once the employer determines under the good faith belief standard that the allegations are true, Title VII compels the employer to take corrective action. Failure to act at that point subjects the employer to Title VII liability in the same manner as would failure to investigate the

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1986) (defamation and wrongful discharge in violation of public policy).

allegations. *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977). If the employer is to avoid Title VII liability to the victim, it therefore is legally bound to take corrective action upon a good faith belief that the allegations are true.

**2. The State Wrongful Discharge Cause In Fact Standard**

Where the alleged harasser challenges the employer's responsive action, the question arises what standard, good faith or cause in fact, should be applied to the employer's action.

Some states apply the same good faith standard as Title VII to wrongful discharge actions based on a just cause requirement for termination.[12] In those states the cause requirement for termination is satisfied by the employer's good faith belief that cause existed. Since the same good faith belief standard is applied in a wrongful discharge action as would be applied in a Title VII action, the employer faces no greater risk due to its fulfillment of Title VII imposed duties.

In several other states, however, the result is otherwise. In these states, the employer is required to meet a conflicting higher cause in fact standard if it

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[12] *Balduvin v. Sisters of Providence in Washington, Inc.*, 769 P.2d 298, 304 (Wash. 1989); *G&M Employment Service, Inc. v. Commonwealth*, 265 N.E.2d 476, 480 (Mass. 1970), *appeal dismissed*, 402 U.S. 968 (1971); *Simpson v. W. Graphics Corp.*, 643 P.2d 1276, 1277-79 (Or. 1982) (en banc); *Scherer v. Rockwell Int'l Corp.*, 766 F. Supp. 593 (N.D. Ill. 1991).

is to avoid liability for discharge without cause.[13] Under the holding of the Ninth Circuit, Arizona is one of these cause in fact states.[14] In these states, the employer's risk of liability for fulfilling its Title VII imposed duties is much greater because it can avoid liability to the discharged employee only if cause for termination in fact exists.

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[13] *Wilkerson v. Wells Fargo*, 212 Cal. App. 3d 1217, 1230-31, (1989) (good faith belief no defense to breach of contract); *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990) (applying Alaska law; however, dissent would hold that Alaska does not require cause in fact); *Video Elec., Inc. v. Tedder*, 470 So.2d 4, 6 (Fla. Dist. Ct. App. 1985), *aff'd* 491 So.2d 533 (Fla. 1986) (where the employer has not contractually reserved the right to be the sole arbiter of the employee's performance, the jury is to decide whether the employee's conduct justified termination); *Adams v. Frontier Airlines Fed. Credit Union*, 691 P.2d 352, 354 (Colo. Ct. App. 1984) modified on denial of rehearing, cert. denied (1984) (question of incompetence of employee incompetency to be made by trier of fact, not by Board of Directors who made termination decision); *Lukasic v. Riddell, Inc.*, 452 N.E.2d 55, 60 (Ill. Ct. App. 1983) ("It is for the trier of fact to determine whether the employee disobeyed reasonable orders and was discharged for good cause."); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 895-97 (Mich. 1980) (where an employee has the contractual protection of a good cause provision, the jury is to determine whether the employee was terminated for good cause; this is to be contrasted with "satisfaction contracts" in which the employer need have only good faith dissatisfaction with the employee's performance in order to terminate.).

[14] Ferrellgas contends that the Ninth Circuit erred in placing Arizona in this group. *See* discussion *supra* note 6.

### 3. The Conflict Between The Federal Good Faith Belief And The State Cause In Fact Standards Creates An Untenable Dilemma For Employers

Where sexual harassment is the cause for termination, employers in cause in fact states are placed on the horns of an untenable dilemma. To avoid Title VII liability to the victim, the employer must take corrective action once a good faith belief is formed. The employer, however, will not escape subsequent liability to the harasser unless a finder of fact determines cause in fact exists.

If the employer defers taking corrective action until cause in fact can be determined, it exposes itself to Title VII liability to the victim for failure to promptly take corrective action based upon its good faith belief.[15] Taking corrective action upon its good faith belief, however, exposes the employer to liability to the harasser if it subsequently does not establish cause in fact. However the employer responds, the employer is exposed to liability.

This dilemma is particularly burdensome to employers since they do not voluntarily create it. Federal law, Title VII, thrusts the dilemma upon the employer.[16]

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[15] *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984).

[16] This situation is to be distinguished from other discharge cases where the decision to discharge is due to conduct unregulated by federal law, such as theft, insubordination, illegal drug use. In those cases, the employer "voluntarily" decides what if any disciplinary action to take. It was not legally bound by federal law (as it is here) to take any corrective action whatsoever.

The dilemma is also unavoidable. An employer in cause in fact states cannot comply with both Title VII and state law requirements regarding wrongful discharge even if it opts for corrective action short of discharge. While taking lesser action may protect the employer from wrongful discharge liability, it will not avoid the risk of liability to the person harassed for not promptly or adequately remedying the harassment.[17]

Furthermore, opting for corrective action short of discharge would significantly impair the Congressional purposes behind Title VII. Discharge is the single most effective threat or remedy available to the employer to rid the workplace of sexual harassment. If that remedy is unavailable to the employer due to its risk of wrongful discharge liability, Title VII is rendered "toothless" in cause in fact states. To keep the "bite" in Title VII, the employer, after having made a reasonable determination, must be free to choose whatever corrective action it reasonably believes is needed to remedy the harassment. The employer should be allowed to do this without facing the dilemma of possible liability to the harasser or the harassed.

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[17] The adequacy of the corrective action taken depends on how effectively it remedies the sexual harassment. *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991). It does not depend upon whether the employer's belief which triggered its duty to act was based on good faith or cause in fact.

### B. Uniformity And Guidance Regarding The Interplay Of Title VII And State Law Of Wrongful Discharge Is Necessary To Avoid Undermining Important Goals of Title VII

Resolution of the Question Presented will provide urgently needed uniformity and guidance to federal and state courts in actions by victims for failure to take corrective action and in wrongful discharge actions by alleged harassers for taking corrective action without just cause. The lack of uniformity between the Ninth Circuit opinion holding that cause in fact is the just cause standard required to avoid liability to the accused for the corrective action taken and the Title VII good faith belief standard requires resolution so that employers are not placed at risk for complying with Title VII.

Employer liability for complying with Title VII imposed obligations differs depending upon whether the state requires cause in fact or good faith belief. Employers should not face differing liabilities for Title VII compliance among the states. Uniformity is clearly needed. This tension surrounding the appropriate standard can only be resolved, and the important goals of Title VII furthered, by reversing the Opinion of the Ninth Circuit.

The failure to provide this guidance and uniformity will greatly impede the private enforcement of Title VII, upon which the EEOC so heavily depends.[18] Pre-

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[18] In *Stockley v. AT&T Info. Sys., Inc.*, the court spoke of the "strong federal policy favoring vigorous enforcement of federal civil rights statutes." 687 F. Supp. at 769. It also recognized that "[p]rivate compliance and enforcement procedures are essential to the success of the EEOC's efforts to eliminate employment

sented with possible liability to either the victim or the harasser, the employer may choose to risk liability to whomever has the lesser damages. Since Title VII damages historically, as well as under the Civil Rights Act of 1991,[19] generally are less than common law contract or tort damages, the employer may elect to risk liability to the victim. The result is that private enforcement will be seriously eroded.

Private enforcement of Title VII can be preserved, however, if the Ninth Circuit's Opinion requiring cause in fact instead of Title VII good faith belief is reversed.

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discrimination. Such private enforcement would be undermined if statements made during [Title VII] investigations were not protected by a qualified privilege." *Id.*

The effect of the Ninth Circuit Opinion is illustrated by *Stockley*. There an employer was sued for defamation arising from a Title VII investigation and termination for sexual harassment. The EEOC urged the court to adopt a qualified privilege for the employer's investigation. "Federal policy," urged the EEOC, requires that statements made by an employer in the course of fulfilling its affirmative duty to investigate a complaint of sexual harassment be accorded a qualified privilege. If such a privilege were not accorded the employer, the EEOC's "interest in eliminating employment discrimination will be undermined. . . ." The Brief of the EEOC as *amicus curiae* in *Stockley v. AT&T Info. Sys.* is included in the appendix, p. 48a, *infra*.

[19] The Civil Rights Act of 1991 amended § 102 of the Civil Rights Act of 1964 to include recovery of compensatory and punitive damages for intentional discrimination up to certain amounts depending upon the number of an employer's employees. Pub.L. 102-166, Nov. 21, 1991, 105 Stat. 1071 (Title 2, § 601, 1201 to 1224; Title 16, § 1a-5 note; Title 29, § 626; Title 42, § 1981, 1981 notes, 1981a, 1988, 2000e, 2000e note, 2000e-1, 2000e-2, 2000e-4, 2000e-4 note, 2000e-5, 2000e-16, 12111, 12112, 12209).

### C. The Ninth Circuit Opinion Conflicts With The *Garziano* Opinion From The Fifth Circuit, The *Crimm* Opinion From The Eighth Circuit And An Increasing Number Of District Court Opinions

The Ninth Circuit Opinion conflicts in principle with United States Court of Appeals decisions, *Garziano v. E.I. DuPont de Nemours & Co.* and *Crimm v. Missouri Pacific R.R. Co.* from the Fifth and Eighth Circuits, respectively. Both *Garziano* and *Crimm* apply a good faith belief standard to Title VII imposed action taken by the employer. An increasing number of district court decisions also apply a good faith belief standard. These conflicts are another important reason for granting a Writ.

#### 1. The Conflict With *Garziano v. E.I. DuPont de Nemours & Co.*

In *Garziano,* the Fifth Circuit held that so long as the employer acted in good faith, it was protected by a qualified privilege in a defamation action arising out of an employee's discharge due to the employer's belief the employee was guilty of sexual harassment. In reaching this decision, the Fifth Circuit reasoned that "federal law imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment, including redressing known occurrences of sexual harassment." *Garziano,* 818 F.2d at 387. The employer, therefore, was shielded from liability for fulfilling its Title VII duties in good faith.[20]

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[20] *Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764 (E.D.N.Y. 1988), reached the same result. The *Stockley* court uses the phrase "reasonable belief" whereas the *Garziano* court uses "good faith." Both phrases are the same, however, as they refer to the nature of the employer's belief formed as a result of its reasonable investigation into the allegations.

*Garziano*, thus, protects the employer by providing a limited immunity for its good faith fulfillment of Title VII imposed duties. It is entirely inconsistent to extend an employer acting in good faith protection in a defamation action, such as in *Garziano*, but deny similar protection to an employer in contract actions arising out of the very same nucleus of facts, as the Ninth Circuit would do.[21] The Ninth Circuit Opinion, thus, conflicts with *Garziano*.

**2. The Conflict With *Crimm v. Missouri Pacific Railroad Company***

The Ninth Circuit Opinion also conflicts with *Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703 (8th Cir. 1984). Crimm was discharged upon his employer's good faith belief that he was guilty of sexual harassment. Crimm, however, claimed that his termination violated the Age Discrimination in Employment Act ("ADEA")[22] and that the reason given was merely a pretext. The Eighth Circuit held that the employer's reasonable determination, i.e., its good faith belief,[23]

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[11] Ashway's suit also included a defamation claim. The District Court granted summary judgment on it after finding that Ferrellgas had acted in good faith so as to not exceed its qualified privilege. It is inconsistent to hold that the same good faith does not protect it from contract liability arising out of the same set of facts. Appendix, p. 13a.

[22] 29 U.S.C. §§ 621, *et seq.*

[23] The Eighth Circuit uses "reasonable basis" or "reasonable determination" to denominate the nature of the employer's belief and states that it is not based on a bare good faith belief. Regardless of the terminology used, the court is referring to the employer's belief based upon a reasonable investigation as was the case in the Ninth Circuit opinion. *Crimm*, 750 F.2d at 713.

that Crimm had sexually harassed its employee, constituted a defense to Crimm's ADEA claim.

To the extent the Eighth Circuit applied Title VII's good faith belief standard to the employer's conduct rather than a cause in fact standard, *Crimm* conflicts with the Ninth Circuit Opinion.

**3. The Conflict With Other District Court Cases**

In addition to *Stockley*,[24] the Ninth Circuit Opinion conflicts with a growing number of District Court cases. *Scherer v. Rockwell Int'l Corp.*, 766 F.Supp. 593 (N.D. Ill. 1991) is most on point, although Scherer claimed breach of an implied covenant of good faith and fair dealing instead of breach of a just cause provision. Scherer had a very favorable employment agreement under which he could be terminated only for cause. Rockwell claimed its good faith belief that Scherer was guilty of sexual harassment constituted "cause" for his termination. Scherer claimed that "cause" meant "cause in fact".

The court decided that good faith belief constituted cause. "Rockwell need not establish sexual harassment by a *preponderance of the evidence*, as a court must, but could surely terminate [Scherer] for 'misconduct' found reasonably and in good faith." 766 F.2d at 603 (emphasis added). Thus a good faith belief standard was applied to the determination of whether cause existed for the termination. *Scherer* conflicts directly with the Ninth Circuit Opinion.

*Johnson v. Int'l Minerals and Chem. Corp.*[25] from the Western District of South Dakota also applied a

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[24] See *supra* note 20.

[25] (Not reported in F. Supp.) 1986 WL 8415 (W.D.S.D. 1986).

good faith belief standard which conflicts with the Ninth Circuit opinion. Without deciding whether cause was required to terminate, the court stated:

> Even if IMC was required to show just cause for the discharge of Plaintiffs, it is abundantly clear that IMC did have good cause for discharging Plaintiffs in light of the results of IMC's investigation into the charges of sexual harassment and sexual discrimination by Plaintiffs.

1986 WL 8415 at 2.

The good faith belief standard was also applied in *Feldleit v. Long Island R.R.*, 723 F. Supp. 892 (E.D.N.Y. 1989). The employee/plaintiff was disciplined because of allegations that he had sexually harassed another employee. The employer investigated the charges, but the charges were not substantiated. The alleged harasser brought suit seeking damages for, *inter alia*, emotional distress. The court denied recovery, stating that

> Neither the [Railway Labor Act] or (sic) the [Federal Employer's Liability Act] suggest that employers who in good faith comply with the national policy aimed at eradicating employment discrimination against women. . . should risk incurring liability for tort damages for the emotional distress suffered by a worker accused of sexual harassment by a fellow employee.

*Id.* at 901.

Thus it is the employer's knowledge acquired in good faith at the time of its decision and not the

ultimate accuracy of its finding of sexual harassment which determines the employer's liability to a disciplined employee.

* * *

Each of the foregoing cases arise from the employer's fulfillment of its Title VII duty to take corrective action which was triggered by the employer's good faith belief that harassment occurred. The same good faith belief standard should apply as well to the employer's potential liability in state wrongful discharge actions and a growing number of cases so hold. The conflict created by the Ninth Circuit opinion urgently needs to be resolved by this Court.

## II. The Good Faith Belief Standard Under Title VII Preempts The Cause In Fact Standard Under State Law

A state law requirement of cause in fact to avoid liability for corrective action taken pursuant to Title VII is inconsistent with, and must be preempted by, Title VII's good faith belief standard for that corrective action. Failure to apply the good faith belief standard to state law wrongful discharge actions involving corrective action taken pursuant to Title VII, creates a serious obstacle to the full achievement of the congressional goals and purposes in enacting Title VII.

Even where Congress has neither expressly preempted state law nor fully "occupied the field," the Court has long held that:

> [S]tate law is pre-empted to the extent that it actually conflicts with federal law.

> Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, *see e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,142-43 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

*English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). State law which has "come into collision with an act of Congress" must yield to the "supreme Law of the Land." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210 (1824).

Conflict preemption does not depend upon the purpose of the state law, but rather upon the effect that state law has upon supreme federal law. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). Where there is an "actual conflict," state law is "preempted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984).

As this Court has often recognized, preemption analysis must focus "on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted, [and] . . . regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-47 (1959). Because "the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy," *id.* at 247, this Court has frequently held that

damages cannot be awarded for conduct required, or encouraged, by state law.[26]

With regard to Title VII, Congress has expressly indicated that state law will be preempted to the extent that such law conflicts with the provisions of Title VII or the accomplishment of the full objectives and purposes of Congress in enacting the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000h-4. If "any provision of State law . . . is inconsistent with any of the purposes of this Act, or any provision thereof," it must fall. *Id.* at § 2000h-4; *see also* 42 U.S.C. § 2000e-7.

Here, a state law requirement of cause in fact to avoid liability for wrongful discharge clearly stands as an obstacle to the achievement of Congress' purposes in enacting Title VII, and conflicts with Title VII's good faith belief requirement for employer action. The cause in fact requirement exposes an employer to liability to an alleged harasser for fulfilling in good faith its Title VII duties to investigate harassment allegations and take appropriate corrective action. To assure full compliance with Title VII - surely the result Congress intended - employers must not be subjected to liability under state law to the harasser for taking the action required by federal law to protect the victim.

As in *Ouellette*, *Kalo Brick & Tile* and *Garmon*, the law of Arizona or any other state setting a cause

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[26] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494-97 (1987) (preemption of damage suits for water pollution); *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (preemption of damage suits for freight overcharges); *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959) (preemption of damage suits for defamation).

in fact standard for discharge[27] subjects employers regulated by Title VII to liability in damages for conduct compelled by federal law. This can only be avoided by applying the Title VII standard of good faith belief to judge the propriety of the employer's action in termination of an alleged sexual harasser both with regard to Title VII liability to the victim and state law wrongful discharge liability to the harasser.

## CONCLUSION

This is an appropriate case to resolve the question of the correct standard to be applied so that the employer can avoid liability both to the person complaining of harassment and the person accused of harassment for action taken by an employer in fulfilling in good faith its Title VII imposed obligations. Resolving the conflict surrounding the appropriate standard to be applied so that the employer can satisfy both Title VII and state law will create uniformity for employers without regard to their place of residence. It also will provide needed guidance to federal and state courts and eliminate the growing conflict among them. It will eliminate the unjust and unwarranted employer dilemma caused by the conflicting standards. Moreover, it will encourage private enforcement of Title VII by removing the risk of liability the employer has for the good faith fulfillment of its Title VII imposed obligations.

For these reasons, the Writ of Certiorari should be granted and the Judgment below reversed.

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[27] *See supra* note 13.

Respectfully submitted,

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# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**No. 90-15008**
**D.C. No. CV-88-1806-PHX-CA**

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CURTIS S. ASHWAY,
Plaintiff-Appellant,

vs.

FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V,

Defendant-Appellee.

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**FILED**
**MAY 14 1991**
**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

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**MEMORANDUM***

**Appeal from the United States District Court**
**for the District of Arizona**
**C.A. Muecke, District Judge, Presiding**

**Argued and Submitted April 11, 1991**
**San Francisco, California**

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Plaintiff-appellant Curtis S. Ashway brought an action against defendant-appellee Ferrellgas[1] ("the company") for terminating his employment for allegedly sexually harassing co-worker Sharon Tye. The district court granted summary judgment in favor of the company after finding the company adequately investigated the sexual harassment allegations before firing Ashway. We affirm.

## I

Ashway filed a complaint in state court for breach of his employment agreement, wrongful termination in violation of public policy, negligence in failing to properly investigate the sexual harassment allegations, and defamation. The company removed the action to federal district court. On April 20, 1989, the district court granted summary judgment for the company on all the counts. On December 4, 1989, the district court denied Ashway's motion for new trial or amendment of judgment and entered judgment for the company.

In granting summary judgment in favor of the company, the district court concluded that one common issue governed each of Ashway's causes of action: whether the company breached a duty to Ashway to adequately investigate the sexual harassment allegations before terminating him. The court found that the company met its duty, and that its investigation was adequate as a matter of law.

On appeal, Ashway essentially argues that the district court improperly granted summary judgment for two reasons. First, Ashway maintains the company's investigation was inadequate. Second, Ashway contends that, under Arizona law, the company's good faith belief that it had cause to fire him is not enough, and that the company had to have actual cause before terminating him. According to

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[1] Ferrellgas is the successor in interest to defendant/appellee Buckeye Gas Products Company, the entity that originally hired Ashway.

Ashway, material issues of fact remain in dispute regarding both issues.

II

On the question of the adequacy of the investigation, we agree with the district court that the company's investigation was adequate as a matter of law. The company supported its summary judgment motion with documents, affidavits, and deposition testimony documenting its investigation. Personnel Director William Cahill described in his affidavit the steps he took to investigate Tye's complaint. Cahill stated he discussed Tye's allegations and Ashway's behavior at length with Tye, who seemed very sincere. Tye also provided Cahill with a written statement. Cahill then discussed Tye's complaint over the phone with Division Operations Manager John Jonescu, who had found Tye crying one night after a particular disturbing encounter with Ashway; with Robert Hetzler, Jonescu's supervisor; and with Ashway's supervisor and Tye's boss, Gilbert Johnson. Each of the men indicated Tye in no way provoked the conduct.

Cahill also discovered that Hetzler's secretary, Susan Richardson, had knowledge regarding the allegations. Cahill asked her to submit a written statement. Richardson's statement indicated that Tye told Richardson that Ashway had entered her office when she was alone, stood in front of her desk, fondled his genitals, said he was the biggest and best in town and told her angrily, "if she didn't want him, she didn't know what she was missing." Richardson also stated former employee Tammy Cooper told Richardson that Ashway routinely described his sexual activities to her (Cooper) in detail. The company tried to locate Cooper but was unsuccessful.

Cahill stated he also discussed the matter with the company's area vice president and with corporate counsel, who advised Cahill to terminate Ashway. Based on that advice

and the belief by Cahill, Hetzler and Hundley that Tye's allegations were true, the company instructed Hetzler to terminate Ashway unless Ashway did something to make Hetzler believe the allegations were false. On December 1, 1986, Johnson and Hetzler met with Ashway and gave him a copy of Tye's statement. Although Ashway appeared to be amused by the allegations, after some prodding he ultimately denied them. Hetzler determined Ashway was lying, and gave Ashway an hour to submit his resignation or be terminated. When Ashway refused to resign, he was terminated.

Ashway argues that certain deposition testimony by Jonescu, Johnson, Hetzler, and Richardson suggests that the company did not conduct the investigation in the manner described by Cahill. An examination of this testimony, however, reveals merely that the witnesses did not recall all their specific conversations with Cahill regarding Tye's complaint, and that they did not have personal knowledge of Ashway's harassing behavior. The testimony does not raise a genuine issue of material fact as to the adequacy of the investigation, or as to Cahill's credibility in describing the investigation.

Finally, as the district court pointed out, the fact that the company's investigation "may have been less extensive than the discovery involved in this case" does not mean the company did not adequately investigate Tye's allegations. Because Tye maintained that no other employees were present when the harassment occurred, the company's failure to interview Tye's other co-workers cannot be considered negligent.

We conclude that the company's investigation of Tye's complaint, which included interviews with Tye and four of her co-workers, written verification from Tye and Richardson, and a meeting with Ashway, was adequate as a matter of law. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (investigation of sexual har-

assment charges deemed adequate where employer interviewed complainant, alleged harassers, and two potential witness co-workers).

## III

We next turn to Ashway's contention that he was terminated without cause in violation of his employment agreement. The company conceded for the purposes of summary judgment and this appeal that Ashway's employment agreement requires cause for termination, but maintains the district court correctly found that cause existed as a matter of law. Ashway argues summary judgment was improperly granted on this issue because, under Arizona law, an employer must have actual cause for termination, and an employer's good faith belief that cause for termination exists is not enough.

No Arizona court has yet addressed this issue directly. Nevertheless, Ashway argues that two Arizona Court of Appeals cases, *Davis v. Tucson Arizona Boys Choir Society*, 137 Ariz. 228, 669 P.2d 1005 (Ct. App. 1983), and *Jeski v. American Express Co.*, 147 Ariz. 19, 708 P.2d 110 (Ct. App. 1985), suggest that the Arizona Supreme Court would hold that an employer must show it had actual cause to terminate an employee, rather than a mere good faith belief it had cause.

The company maintains Ashway's reliance on *Davis* and *Jeski* is misplaced, and that *Loffa v. Intel Corp.*, 153 Ariz. 539, 738 P.2d 1146 (Ct. App. 1987), established that an employer's good faith determination that cause for termination exists is sufficient absent evidence of bad faith or pretext. The company also argues that, given federal and state laws prohibiting sexual harassment, *see* 42 U.S.C. §§ 200e, *et seq.* (Title VII); Ariz. Rev. Stat. § 41-1461, *et seq.*, along with the requirement that employers investigate and eradicate sexual harassment in the workplace, *see Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987) (en banc),

it is unlikely the Arizona Supreme Court would require an employer, who terminates an employee it believes in good faith has been sexually harassing a co-worker, to prove that the sexual harassment actually occurred.

Although the Arizona Supreme Court has not yet spoken on this issue, courts in other jurisdictions have recently held that, where an employment contract requires cause for termination, the employer must show that cause actually existed. *See Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990) (interpreting Alaska law); *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217, 261 Ca. Rptr. 185 (1989). Other courts, however, have held that an employer's good faith determination that it has cause to terminate an employee is sufficient, and that the employer's decision to terminate an employee for cause should not be second-guessed by a jury. *See Simpson v. Western Graphics Corp*, 293 Or. 96, 643 P.2d. 1276 (Sup. Ct. Or. 1982) (holding that employer's good faith determination that cause existed was sufficient and that grounds for cause need not have actually occurred);*Frazier v. Minnesota Mining and Manufac.*, 82 Or. App. 328, 728 P.2d 87, 88 (Or. App. 1986) (holding question of what constitutes cause was for employer to decide, although factual issues remained in dispute as to whether discharge was pretextual or in bad faith), *review denied*, 303 Or. 74, 734 P.2d 354 (1987).

In light of Arizona's strong public policy against sexual harassment—particulary, the Arizona Supreme court's ruling in *Ford* that employers who fail to investigate and remedy sexual harassment may be held liable for damages to the injured employee—we believe the Arizona Supreme Court might well hesitate before allowing a jury to second guess an employer's good faith determination that sexual harassment has occurred. *See Sanders*, 911 F.2d at 204-18 (Kozinski, J., dissenting) (discussing the negative consequences of requiring an employer to show that cause for termination actually existed where the employer had a

good faith belief that cause existed and then terminated the employee to further important public policy goals. Nonetheless, we conclude that, even assuming the Arizona Supreme Court would hold that an employer must show it had actual cause to terminate an employee, summary judgment was appropriate in this case on the issue of cause.

Summary judgment is properly granted where the moving party shows through the pleadings, depositions, affidavits, or other evidence that there is no genuine issue of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Once the moving party does so, the burden shifts to the opposing party to establish that a genuine issue as to a material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish a factual dispute, the opposing party must come forward with evidence of specific facts showing that the dispute exists; it cannot simply rely upon the denials of its pleadings. *Id.*; Fed. R. Civ. P. 56(e).

Ashway has failed to offer affirmative evidence that a genuine issue of *material* fact exists on the question of cause for termination. Ashway simply points to inconsistencies between Tye's description of certain events and her co-workers' testimony. For instance, Tye testified that Ashway used to bang loudly on her door and yell obscenities that her co-workers probably would have heard. Tye also stated the company installed a lock on her door at her request to keep Ashway out. The fact that other employees' testimony may have contradicted Tye's statements on these collateral issues, however, does not raise an issue of material fact as to whether or not any sexual harassment actually occurred.

Moreover, although Ashway could have submitted an affidavit averring that he never sexually harassed Tye or engaged in any of the behavior she described, he failed

to do so. Instead, Ashway chose to rely on negative evidence—specifically, on the fact that no other employee saw Ashway harassing Tye in the manner she described. However, Tye maintained all along that Ashway sexually harassed her only when they were alone, and that no one else witnessed Ashway's behavior. Thus, the fact that no other employee saw any sexual harassment neither undermines the company's determination that the harassment in fact occurred, nor casts doubt on Tye's credibility. Because Ashway has failed to tender evidence of specific facts showing that any material issues remain in dispute, we conclude summary judgment was properly granted.

AFFIRMED.

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**FILED**

**MAY 14, 1991**

**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

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*Ashway v. Ferrellgas, Inc.*, No. 90-15008

NOONAN, Circuit Judge, dissenting:

I dissent. Curtis S. Ashway is entitled to his day before a jury. His evidence raises serious doubts as to the adequacy of the investigation made by the company and even more serious doubts as to the existence of any cause for discharging him. He may well have been fired because of the fantasies of a coworker and the company's anxiety to do the politically correct thing. The material facts he puts at issue should properly have been determined by a jury.

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**No. 90-15008**
**D.C. No. CV-88-1806-PHX-CA**

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CURTIS S. ASHWAY,
Plaintiff-Appellant,

vs.

FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V,
Defendant-Appellee.

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**FILED**

**AUG 07 1991**

**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

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**ORDER**

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc is granted to the following extent:

Section (IV) of the Memorandum filed May 9, 1991 is deleted. In its place, the following text is inserted:

> Upon reconsideration of Ashway's contention that he was terminated without cause in violation of his employment agreement, we conclude that Ashway has raised a genuine issue of material fact as to

the existence of cause. Accordingly, we reverse the district court's grant of summary judgement on this issue.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. SO ORDERED.

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**No. 90-15008**
**D.C. No. CV-88-1806-PHX-CA**

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CURTIS S. ASHWAY,

Plaintiff-Appellant,

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FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V,

Defendant-Appellee.

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**FILED**
**MAR - 2 1992**
**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

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**ORDER**

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CIV 88-1806 PHX CAM

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CURTIS S. ASHWAY, a single person,

Plaintiff,

vs.

FERRELLGAS, INC., et al.,

Defendants.

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FILED
APR 21 1989
BY DEPUTY CLERK

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ORDER

The Court has received and considered Defendant Ferrellgas' Motion for Summary Judgment and/or Motion to Dismiss and Separate Statement of Facts lodged on December 12, 1988. The Court has also received and considered Plaintiff Curtis Ashway's Response, and Separate Statement of Facts, as well as Ferrellgas' Reply. The Court heard and considered the oral arguments of both sides on Friday, February 24, 1989.

This Court now must decide whether Ashway's claims of breach of contract, wrongful termination, negligence in failing to properly investigate, and defamation can withstand summary judgment. Only state law claims are involved; therefore, under the *Erie* Doctrine, Arizona substantive law will apply.

## BACKGROUND

Ashway was hired by Buckeye Gas Products Company, predecessor to Ferrellgas, Inc., in October, 1985. Ashway claims that he was told by Ferrellgas management that he would not be fired without cause. Furthermore, Ferrellgas' policy manual requires that terminations be carried out in a way "that ensures just and equitable treatment for the employee and the Company."

Ferrellgas terminated Ashway's employment on December 1, 1986. Despite Ashway's denial, the only reason given by Ferrellgas for his discharge was sexual harassment.

Sharon Tye, who worked at Ferrellgas as the secretary for Ashway's supervisor, Gilbert Johnston, first complained to her superiors about Ashway's behavior in November of 1988 (sic). Ferrellgas' statement of facts describes Ashway's interaction with Type as having begun with flirtations and from there developing into increasingly sexual harassment. Among other things, Tye complains that Ashway would come into her office alone, grab his genitals, and brag about his sexual adventures.

Ferrellgas asserts that it investigated, and arrived at a belief that Tye's allegations of sexual harassment were truthful, before terminating Ashway's employment. The adequacy of Ferrellgas' investigation is disputed by Ashway.

## ANALYSIS

Even though Ashway has alleged four separate theories for recovery, just two main issues must be addressed to resolve this Motion for Summary Judgment. According to Ashway, Ferrellgas had a duty to him to investigate the accusations of sexual harassment. Ashway also asserts that a jury should be allowed to consider the question of whether Ferrellgas properly investigated the allegations of sexual harassment.

## I. *THRESHOLD QUESTION: FERRELLGAS' DUTY TO ASHWAY*

### A. BREACH OF CONTRACT

For purposes of this motion, Ferrellgas does not dispute that Ashway's employment agreement has been modified to require "just cause" for a termination.[1] Undoubtedly, actual sexual harassment would be "just cause" for a termination. However, a stated cause without some basis for belief is no cause at all.[2] Thus, based on the employment contract alone, this Court may determine that Ferrellgas had a duty to Ashway to at least investigate the allegations of sexual harassment before his termination.

### B. PUBLIC POLICY/WRONGFUL TERMINATION

Ashway also claims his discharge violates public policy. In *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985), the court recognized that a cause of action for wrongful termination of an at-will contract exists in Arizona when the termination violates public

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[1] Although an employment contract for an indefinite term is presumed to be terminable at will, the presumption is rebuttable. *Jeski v. American Express Co.*, 147 Ariz. 19, 21, 708 P.2d 110, 112 (App. 1985). Ashway claims a fact issue exists as to whether Ferrellgas' policy manual, oral statements made by employees, along with the companies standard practices have all combined to create an implied-in-fact term to the employment contract requiring that the employer terminate for cause only. Arizona recognizes an implied-in-fact contract term as an exception to the at-will rule. *Leikvold v. Valley View Community Hospital*, 141 Ariz. 544, ____, 688 P.2d 170, 172 (1984).

[2] Few cases have addressed the meaning of "just cause" for termination. Yet, leaving the determination solely up to the employer would make the meaning of the term illusory. Leaving the determination up to the jury could result in bias in favor of the employee. One commentator has said that it should be left to the Court to decide whether an implied-in-fact term requiring "just cause" for discharge has been breached. Note, *Employment at Will—The Implied Contract Limitation In Arizona*, 1985 Ariz. St. L.J. 783, 795 (1985).

policy.[3] For this public policy exception to apply, the employee's termination must violate "a clear mandate of public policy." *Wagenseller,* at 1034.

State and federal discrimination statutes, regulations, and judicial decisions require employers to investigate complaints of sexual harassment in the work place.[4] However, there is apparently no legal authority that specifically articulates a duty to the accused that requires an employer to conduct an adequate investigation before making a decision to terminate based on allegations of sexual harassment. Nevertheless, Ferrellgas has admitted that public policy requires it to investigate claims of sexual harassment.[5]

Sexual harassment is obviously objectionable behavior. Its reprehensibility is undoubtedly one of the reasons it has risen to the level of a public policy concern. It seems somewhat absurd that the public policy against sexual harassment in the work place, requiring an employer to investigate charges of sexual harassment, creates an

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[3] Ashway's complaint also alleges violations of the implied convenant of good faith and fair dealing. However, a narrow reading of *Wagenseller* suggests that the "bad faith"/wrongful termination cause of action is only available when a discharge has been based upon an employer's desire to avoid the payment of benefits already earned. Ashway's Response to Ferrellgas' Motion for Summary Judgment does not seem to challenge this narrow interpretation.

[4] Sexual harassment is a form of sex discrimination, prohibited by Title VII, 42 U.S.C. §§ 2000e, *et seq.*, and Ariz. Rev. Stat. § 41-1461, *et seq.*

[5] Relying on an Alabama case, Ferrellgas suggests that public policy supports immunity from liability for employers who discharge employees for sexual harassment. In *Willis v. Ideal Basic Indus., Inc.* 484 So.2d 444 (Ala. 1986), the Alabama Supreme Court rejected the argument that the public policy exception should apply to the discharge of an employee who allegedly committed acts of sexual harassment. Needless to say, Alabama case law is not controlling in this jurisdiction.

obligation to protect a complainant, but does not protect an innocent person who has been accused.[6]

It would seem public policy could support a dual duty on the part of the employer to both the apparent victim and the accused to investigate charges of sexual harassment.

## C. NEGLIGENT SUPERVISION/INVESTIGATION

While no Arizona cases discuss a possible cause of action for negligent supervision or investigation in the wrongful termination context, Arizona has adopted § 213 of the Restatement (Second) of Agency, which provides generally for a negligent supervision cause of action.[7]

In *Markowitz v. Arizona Parks Board*, 146 Ariz. 352, 706 P.2d 364 (1984) the court said the question of duty is to be decided by the court. *Id.* 356. The Court should find a duty if reasonable men would agree that Ferrellgas had an obligation to use some care to avoid or prevent injury to Ashway. W. Prosser, *Handbook on the Law of Torts*, § 42 at 324-27 (4th ed. 1971); *see also, Markowitz*, at 356.

Negligence theory also suggests a possible duty on behalf of Ferrellgas to investigate before terminating Ashway's employment.

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[6] When an innocent person is accused of sexual harassment, his job, his ability to earn a livelihood, and his reputation are all placed in jeopardy. A termination decision based on unfounded accusation causes a discharged employee the injury of loss of employment, damage to reputation, and emotional distress. *See e.g., Huff v. County of Butler*, 542 F. Supp. 751 (W.D. Pa. 1981).

[7] The comment to *Restatement (Second) of Agency*, § 213 provides that "this rule is a special application of the general rules stated in the Restatement of Torts and is not intended to exhaust the ways in which a master or other principal may be negligent in the conduct of his business."

## II. *CENTRAL ISSUE: WHETHER FERRELLGAS FAILED TO PROPERLY INVESTIGATE*

At least for purposes of this motion, this Court can conclude that Ferrellgas had a duty to adequately investigate the charges of sexual harassment before terminating Ashway's employment. Still, Ashway can only avoid summary judgment if there is a factual dispute suggesting that Ferrellgas' investigation may have been inadequate.

In *Loffa v. Intel Corp.*, 153 Ariz. 539, 738 P.2d 1146 (App. 1987), the court determined that the jury could not considered whether certain altercations involving the employee had actually occurred. Instead, the jury's task, in deciding whether the employer had breached the contract, was to examine whether the employer had followed the appropriate procedural steps in terminating the employment.[8] In the case before this Court, the procedural step in question is the investigation.

Ferrellgas supported its version of the facts relating to the adequacy of the pre-discharge investigation with depositions, an affidavit, and other evidence. According to Ferrellgas the investigation occurred as follows: One day during November 1988, Tye apparently had a particularly disturbing encounter with Ashway. That evening, John Jonescu, Ferrellgas' Phoenix Division Operations Manager, noticed that Type was upset and inquired as to the reason. Tye said that Ashway had been sexually harassing her. Jones immediately brought the matter to the attention of Robert Hetzler, Ferrellgas' Southwest Regional Manager

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[8] Some courts in other states appear to restrict the jury's consideration even more than Arizona. In California, one court has said "wrongful termination as well as the adequacy of an investigation leading to the exercise of an employer's autonomous right to determine its own legitimate business interest renders this a pure question of law." *LaGoe v. Duber Ind. Sec., Inc.*, 239 Cal. Rptr. 445, 194 Cal. App. 3d 349 (1987); *see also, Simpson v. Western Graphics Corp.*, 29 Or. 96, 643 P.2d 1276 (1981).

and Johnston's supervisor. Hetzler discussed the situation with Tye. Next, Hetzler related the facts to William Cahill, Director of Personnel. Cahill had Tye put her allegations in writing. He also learned that Susan Richardson, Hetzler's secretary, had knowledge related to Tye's allegations. Richardson was also asked to submit a written statement supporting Tye's allegations. Cahill spoke with all supervisors concerned with the situation. Cahill, Hetzler, and others involved in the investigation believed that Tye's statements were true and that she did not provoke Ashway's sexually harassing behavior.

Before deciding how the situation should be handled, Cahill also spoke with Ferrellgas' Area Vice President and corporate counsel. On the advice of corporate counsel, Ashway's employment was to be terminated unless he created a doubt when confronted with the allegations. Hetzler was given final authority to decide whether Ashway should be discharged. Hetzler and Johnston met with Ashway on December 1, 1986. Ashway received a copy of Tye's written statement.[9] He denied the allegations. But, Hetzler claims he could determine from Ashway's expressions and attitude at the meeting that he was lying.

Ashway generally denies Ferrellgas' version of the facts relating to the investigation. However, Ashway's denials do not counter Ferrellgas' version of how the investigation occurred with specific references to depositions, affidavit, or other evidence.

Instead, Ashway relies on two other arguments in an attempt to show that a factual dispute exists as to the adequacy of Ferrellgas' investigation. First, no other eyewitness accounts of the alleged sexual harassment substantiate Tye's claims. Second, the credibility of Tye's story

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[9] Though Ashway requested 72 hours in which to respond to Tye's allegations, Ferrellgas refused to give him more than the one-hour meeting.

is questionable because of contradicting statements made by some witnesses in this case about Ashway's conduct around others besides Tye.

All evidence must be viewed in a light most favorable to the party opposing summary judgment, giving such party the benefit of all favorable inferences that may be reasonably drawn. *Livingston v. Citizen's Utility, Inc.*, 107 Ariz. 62, 481 P.2d 855 (1971). Still, the facts weight heavily in support of Ferrellgas' motion. It is no surprise that other witnesses could not substantiate Tye's allegations. The likelihood of sexual harassment occurring with other witnesses present, besides the victim, is minimal. Even though the statements of some witnesses contradict the statements of Tye, Ferrellgas was in the best position to decide how much weight to give Tye's statements. At best, Ashway's arguments raise questions about the correctness of Ferrellgas' conclusion that he sexually harassed Tye. However, Ashway's arguments do not necessarily suggest that Ferrellgas' investigation was inadequate.

While Ferrellgas' investigation may have been less extensive than the discovery involved in this case, Ferrellgas did take the time to gather and consider additional facts before deciding to believe Tye's statements. Ferrellgas spoke with Ashway's co-workers and supervisors. It listened to and considered his version of the story. Corporate counsel was even consulted before Ashway was terminated.

This Court must conclude that no factual dispute exists as to whether Ferrellgas sufficiently investigated Tye's charges of sexual harassment before discharging Ashway.[10]

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[10] While private employees may be entitled to some due process rights before termination, it would seem ridiculous to suggest that they receive the full panoply of protection associated with due process. An employer's interest in operating a business efficiently and profitably must be balanced with the interest of the employee in maintaining his employment. *Crosier v. United Parcel Service*, 150 Cal. App. 3d 1132, ——, 198 Cal. Rptr. 361, 366 (1983).

Juries are not permitted to second guess whether an employer's termination decision was correct. *See, Loffa.* Likewise, beyond ensuring that the termination process has been fair, a court should not meddle with an employer's discretion to terminate an employee.

III. ***DEFAMATION***

The issues of whether Ferrellgas had a duty to Ashway to investigate and whether it fulfilled that duty are central to Ashway's claims of breach of contract, wrongful termination, and negligent supervision/investigation. Ashway's defamation claim raises the same two issues in a less direct fashion. Ashway's defamation claim is against Ferrellgas for publishing the accusations and accepting them as true without an adequate investigation into their truth or falsity.

Ferrellgas asserts that a qualified immunity protects it from liability for defamation. In determining whether a qualified privilege exists the Arizona courts will look to the occasion on which the statement was made and not the statement itself. *MacConnell v. Mitten,* 131 Ariz. 22, 638 P.2d 689 (1981). Whether the privilege attaches to a communication is a question for the court. *Hirsch v. Cooper,* 152 Ariz. 450, 458, 737 P.2d 1092, ___ (App. 1986).

In the instant case, public policy required that Ferrellgas investigate the allegations of sexual harassment. Publications between employees at the company could not be avoided. Thus, the qualified privilege applies to the communications made between employees as a matter of law.

However, if a qualified privilege does exist, and it is maliciously abused, then it is forfeited. *Green Acres Trust v. London,* 141 Ariz. 609, 616, 688 P.2d 617, 624 (1984). Whether malice in fact forfeited any privilege to a communication is generally determined by the trier of fact.[11]

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[11] Malice in fact is established by showing that defendant acted with actual knowledge that a statement was false, or that he acted in reckless disregard of its truth." *Hirsch,* at 458, 737 P.2d at 1096.

However, this Court has already determined that no material facts are in dispute as to whether Ferrellgas' investigated adequately. When an employer's investigation has been adequate, no reasonable juror could find that the publications, made in connection with or as a result of the investigation, were malicious.[12] Thus, Ferrellgas is entitled to summary judgment on Ashway's defamation claims on the basis of its qualified immunity.

Ferrellgas makes another argument regarding Ashway's defamation claims that is meritorious. In his Response brief, Ashway raised the issue of the defamation with respect to a publication by Hetzler to Richardson. This publication was made in late November, 1986; it is therefore time barred by Arizona's one year statute of limitations. A.R.S. § 12-541.

## CONCLUSION

Ashway has set out several legal theories that suggest Ferrellgas had a duty to adequately investigate Tye's charges of sexual harassment before discharging him. The duty to investigate is essential to each of the causes of actions discussed in this order. The central issue in determining if these causes of actions should survive summary judgment is whether Ferrellgas has adequately investigated.

Ferrellgas has come forward with facts, supported by depositions, an affidavit, as well as other evidence, suggesting that it conducted an adequate investigation prior to terminating Ashway for sexual harassment. Ashway has failed to counter Ferrellgas' version of the facts with specific references to affidavits or other evidence. Ashway has failed to meet the evidence presented by Ferrellgas'

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[12] In this instance, publications in connection with or as a result of the investigation could include statements between employees at Ferrellgas as well as Mr. Ashway's foreseeable compelled self-publications.

investigation my have resulted in an incorrect conclusion. No material factual dispute exists as to the adequacy of Ferrellgas' investigation.

IT IS THEREFORE ORDERED that Ferrellgas' Motion for Summary Judgment/Motion to Dismiss is granted.

Dated this 20th day of April, 1989.

C.A. Muecke

C.A. Muecke, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 88-1806 PHX CAM

CURTIS S. ASHWAY,

Plaintiff,

vs.

FERRELLGAS, INC., et al.,

Defendants.

FILED
DEC - 6 1992
RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY DEPUTY CLERK

## ORDER

On April 20, 1989, the Court granted summary judgment in favor of defendant Ferrellgas. The Court concluded that reasonable jurors would agree to the adequacy of Ferrellgas' investigation of sexual harassment charges against plaintiff Curtis Ashway prior to his termination.

On May 3, 1989, Ashway timely filed his Motion for New Trial or Amendment of Judgment. Ferrellgas responded on May 22, 1989. On July 19, 1989, Ashway filed his Supplemental Authority in Support and Ferrellgas responded to Ashway's supplement on July 28, 1989. Upon reviewing an update report, the Court discovered this previously overlooked pending motion.

Now, after carefully considering the briefs filed, and having determined that oral argument is unnecessary, the Court rules as follows:

Ashway's motion seeks reconsideration on the basis of select evidence referenced in his Separate Statement of Facts in Response to Ferrellgas' Motion for Summary Judgment. According to Ashway, this evidence "*overwhelmingly* shows that Ferrellgas did not conduct the investigation it now says it did."

However, the Court's April 20, 1989 order reached a different conclusion. The Court specifically reviewed the evidence now referenced by Ashway before rendering its summary judgment decision. Ashway's Separate Statement of Facts did identify conflicts in the testimony of employees of Ferrellgas about the investigation into the sexual harassment charges against Ashway. Yet, such inconsistencies are not unusual under the circumstances. Perfect recall, approximately two years after the date that a series of events occurred, cannot be expected. As is apparent from their qualifying statements, the witnesses, themselves, recognize the limitations of their memories.

However, the Court cannot deviate from its earlier conclusion. Viewing the recording in its entirety, as the Court did previously, Ferrellgas' investigation of the sexual harassment charges against Ashway is clearly adequate. Witness credibility is only an issue for the jury when reasonable jurors would differ. That is not the case in this instance.

Moreover, Ashway's supplemental authority fails to persuade the Court that the summary judgment should be reconsidered. Ashway has provided the Court with a copy of recent Equal Employment Opportunity Commission guidelines. The guidelines refer to the Commission's own investigation of sexual harassment charges:

> The investigator should question the charging party and the alleged harasser in detail. . . . Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment. . . .
>
> Persons with whom she discussed the incident . . . should be interviewed. . . .
>
> If the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony. . . .
>
> In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.'

EEOC Guidelines, at 10-13. While the guidelines are specifically intended for the Commission's own investigations, which arguably may require different standards than employer investigations, Ferrellgas' investigation appears to have been consistent with the guidelines. Contrary to Ashway's contention, if anything, the guidelines support the conclusion that Ferrellgas adequately exercised its duty to investigate.

There are no material issues of fact in dispute. The Court concludes that the previously granted summary judgment was proper.

IT IS THEREFORE ORDERED that Ashway's Motion for New Trial or Amendment of Judgment is denied.

Dated this 4th day of December, 1989.

C.A. Muecke

C.A. Muecke
United States District Judge

**Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Unlawful Employment Practices**

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

**Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11**

(a) Harassment on the basis of sex is a violation of section 703 of title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of

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[1] The principles involved here continue to apply to race, color, religion or national origin.

the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue

of harassment under title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

**Civil Rights Act of 1964, 42 U.S.C. § 2000e-7. Effect on State laws**

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

**Civil Rights Act of 1964, 42 U.S.C. § 2000h-4. Construction of provisions not to exclude operation of State laws and not to invalidate consistent State laws**

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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CIV 88-1806-PHX-CM

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CURTIS S. ASHWAY, a single person,

Plaintiff,

v.

FERRELLGAS, INC., et al.

Defendants.

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ORIGINAL FILED ON THE DATE
DEC 12 1988
RICHARD R. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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## STATEMENT OF FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Ferrellgas, Inc. and submits the following Statement of Facts in Support of Defendant's Motion for Summary Judgment and/or to Dismiss on Plaintiff's Complaint.

### A. Ashway as the Phoenix, Arizona District Manager.

1. Ashway was hired by Buckeye Gas Products Company ("Buckeye"), predecessor to Ferrellgas, Inc. ("Ferrellgas" or "Company"), in October, 1985 [Complaint at V].[1] Ash-

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[1] References to Plaintiff's Complaint are cited as "Complaint" followed by the paragraph number[s].

way took part in the Company's training program in Georgia for six months after he was hired. [Complaint at VI].

2. In May, 1986, Ashway was transferred to Phoenix, Arizona to assume the position of Phoenix District Manager. [Complaint at VI].

3. At the time Ashway was transferred to Phoenix, Gilbert Johnston ("Johnston") was Ferrellgas' Phoenix Division Manager. [Johnston at 9].[2] As Division Manager, Johnston was responsible for eight district managers, including Ashway. [Johnston at 9 - 11].

4. Johnston interviewed Ashway prior to Ashway's accepting the district manager position. [Johnston at 20]. After Johnston's interview with Ashway he expressed doubts to Mr. Owen Cotton, Buckeye's Regional Manager, about the decision to hire Asway. [Johnston at 21]. Johnston, a man who had considerable experience in the propane industry, felt that Ashway was too immature and did not have enough experience for a district the size of Phoenix. [Johnston at 21].

5. On September 9, 1986, Johnston sent a memorandum to Ashway setting forth his dissatisfaction with Ashway's performance as District Manager of the Phoenix District. [This memorandum was produced by Ferrellgas in response to Ashway's document request and a copy is attached as Exhibit 2]. The memorandum states in part:

> I am not at all satisfied with your performance as the district manager of the Phoenix district. Here are some of the reasons: . . .
>
> Memos come to you from the service center on the timeliness of your deposits and mailings. You pay no attention to them.

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[2] References to Johnston's deposition, which was taken on March 23, 1988, are cited as "Johnston" followed by the page number[s]. Excerpts of Johnston's deposition to which this Brief cites are attached in numerical order of page number as Exhibit 1.

> There is too much foolishness on your part, such as blowing a horn, whoops and hollering. The message I got on your answering machine when I called in after hours was in very bad taste. If I had been a customer, or a prospective customer, I would have hung up and wondered what a lunatic company this is. . . .
>
> You and your clerks were observed drinking beer in your office. You claim it was after hours. I do not want, and will not stand for, beer or any other alcoholic beverage in the plant at or after hours. . . .

6. Robert Hetzler ("Hetzler"), the Company's Southwest Regional Manager and Johnston's immediate supervisor, also expressed concern regarding Ashway's management abilities. Hetzler brought his concern to Ashway's attention during the course of Ashway's performance appraisal on October 17, 1986. [Hetzler at 46].[3] Specifically, Hetzler stated:

> I do not feel Curt Ashway has developed to the level necessary to function in the district the size assigned him. I have asked that he be given stated written objectives to help him understand his job function and responsibilities but to date that has not happened. Until that process begins, I do not see Curt moving forward in the development process. Robert O. Hetzler 10-17-86. [Hetzler at 46-47].

7. Johnston sent another memorandum, dated November 20, 1986, to Ashway concerning continued dissatisfaction with his performance. [This memorandum was produced

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[3] References to Hetzler's deposition, which was taken on March 24, 1988, are cited as "Hetzler" followed by the page number[s]. Excerpts of Hetzler's deposition to which this brief cites are attached in numerical order of page number as Exhibit 3.

to Ashway in response to his document request and is attached as Exhibit 4]. The memorandum reads in part:

> You must get your priorities in place. One good example is when the Division Office asked you for your contest results, and you ignored them. Instead you went shopping for office furniture that you didn't even have permission to buy. This is just one example of many that I have been putting up with.
>
> You need to take a more mature attitude toward your employees. Instead of acting like a teenager; blowing a horn, hollering "Hi, Sports Fans", and the like. This will not earn you the respect from your employees that you need. You will get respect from your employees when you show them you know what you are doing by routing the servicemen, helping the drivers with their routing, and being able to answer their questions concerning paperwork when they come to you.

8. In October, 1986, Ashway, after attending a Company barbecue and while driving a Company vehicle on a suspended license was involved in an automobile accident. [Ashway at 103-106].[4]

9. Rather than assume responsibility for this accident, Ashway summoned another Company employee, John Padilla ("Padilla"), to come to the scene of the accident and assume responsibility. [Ashway at 106]. Ashway stated that his purpose for doing so was because he had a suspended driver's license. [Ashway at 106].[5]

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[4] References to Plaintiff's deposition, which was taken on March 25, 1988, are cited as "Ashway" followed by the page number[s]. Excerpts of Ashway's deposition to which this brief cites are attached in numerical order of page number as Exhibit 5.

[5] Ashway had been unable to get an Arizona license due to his suspended license in Georgia. In fact, Ashway went to Nevada in an

10. When Padilla arrived at the scene Padilla agreed to take responsibility for Ashway's accident. [Padilla at 80].[6] Specifically, Padilla testified:

> Q. What did Curt tell you was the reason that he wanted you to take responsibility as the driver?
>
> A. Because him and Rich and Mitchell and Ed Bishop had been drinking. They had had a few beers and they just didn't want to take any chances.
>
> Q. Did he tell you in those exact words, that he had had a few beers?
>
> A. Yeah, he did. He told me, "I've had a few beers and I just don't want to take any chances." and neither did Rich or Mitchell. In fact, they were more, they looked like they were intoxicated. . . .
>
> Q. So did you talk with the police officer?
>
> A. Briefly. Just real briefly. He just said, "Are you the driver" I go, "Yeah." "Can I see your driver's license?" I show him the driver's license and he goes, "Okay, thanks a lot. I'll see you later."[7]

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attempt to obtain a license even though he did not reside in that state and had never resided there. [Ashway at 106-117].

[6] References to Padilla's deposition, which was taken on August 12, 1988, are cited as "Padilla" followed by the page number[s]. Excerpts of Padilla's deposition to which this Brief cites are attached in numerical order of page number as Exhibit 6.

[7] Padilla subsequently prepared a written statement setting forth the circumstances surrounding Ashway's accident. A copy of Padilla's statement, which he identified during the course of his deposition at Exhibit 2, is attached hereto as Exhibit 7.

**B. The Sexual Harassment Allegations.**

11. Sharon Tye, ("Tye") the victim of Ashway's harassment, was an employee of Ferrellgas. Tye began working in the Phoenix Division Office as Division Secretary in August, 1986. [Tye at 18].[8] Tye was Johnston's secretary [Tye at 36]. As Division Secretary it was Tye's responsibility to take care of all the payables in the Arizona districts. In addition she was responsible for the division reports, answering the telephone, typing memorandums for Johnston, fielding questions from the other districts and generally overseeing the operations of the district. [Tye at 34-35]. Johnston essentially gave Tye the authority to correct problems in the districts without initially going to him. [Tye at 37].

12. At the point in time when Tye became Division Secretary, Ashway was the Phoenix District Manager. Although he worked in the District office and Tye in the Division office, their offices were located in the same building. [See diagram drawn by Tye during her deposition attached as Exhibit 9].

13. Due to the close proximity of the Phoenix Division office and the Phoenix District office, the employees in those offices had ample opportunity to interact with one another and observe each other's "activities". For example:

> Q. . . .What type of activity were they involved in instead of business, what do you mean carrying on?
>
> A. Well, Curtis had a horn and it was like a bugle or something, and he would blow it and they would laugh and, you know, you would

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[8] References to Tye's deposition, which was taken on August 11, 1988, are cited as "Tye" followed by the page number[s]. Excerpts of Tye's deposition to which this Brief cites are attached in numerical order of page number as Exhibit 8.

> pick up the telephone and play games and, "Welcome to Joe's Bar and Grill," and everybody thought it was funny. I mean he was the boss, you know, he was the one leading the pack so to speak. So if that was okay for him, professionally, then why wouldn't they pick up the same atmosphere. I mean he gave them no direction. So if you were in the office it was always a party. . . . [Tye at 44].

14. Eventually, Ashway's "activities" began to be directed towards Tye. [Tye at 171-172]. Ashway continued to blow his horn and hop around. In addition, he attempted to enter the Division offices even though the door between the two was locked. [Tye at 172].

15. This activity on the part of Ashway soon developed a sexual nature. [Tye at 172-174]. Specifically, Tye testified:

> Q. Tell me in particular exactly what type of sexual harassment took place before the doors went up.
>
> A. Well, he would come in and sit in front of my desk and you have to understand that no one was there, okay, usually, when he did these things, no one was there, but he would come in and sit in front of my desk, there were a couple of chairs in front of my desk, and start telling me about his dates the night before in very sexual explicit language, tell me exactly what he and his girlfriend had done, and I told him that was his personal business and, you know, I wasn't interested and that it was offensive to me for him to discuss these things . . .
>
> Q. What do you mean when you said telling you about his dates the night before in very explicit language?

A. Well, he would say, he would come in and say, 'Well you wouldn't believe what I did last night,' and he'd say, you know, 'my girlfriend, I had two girls last night and one of them sucked my cock and the other one played with my balls and,' you know, ta da ta da ta da. And he just went on like[9]. . .

16. Tye alluded to various other incidents on the part of Ashway during the court of telephone conversations with Susan Richardson ("Richardson"), Hetzler's secretary. [Richardson at 38-45 and Tye at 215-219].[10]

17. Finally, Ashway's harassment reached a point where Tye could no longer tolerate it and she told her employer

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[9] Although Ashway denies making such statements to Tye or any other Company employee, Ashway admitted in his deposition to having sex with two women at one time.

Q. Well, during your period of time when you were employed here in the Phoenix area with Buckeye Gas prior to December 1, 1986, did you ever have any date with two girls where sexual acts were performed?

A. Yes ma'am. [Plaintiff at 62 as per and accompanied by a copy of Changes and/or Corrections to Deposition signed by Ashway].

[10] References to Richardson's deposition, which was taken on April 29, 1988 are cited as "Richardson" followed by the page number[s]. Excerpts of Richardson's deposition to which this Brief cites are attached in numerical order of page number as Exhibit 10.

A specific incident related to Richardson involved the copy machine in the Division office.

Q. I'm not asking you for a date. I'm asking you what you recall of the next complaint by Sharon to you about Curt Ashway.

A. She had told me one time when were on the phone that he had pressed her up against the copy machine and was pressing himself against her and she had to push away from him.

what had been going on. The event which triggered Tye's complaint of sexual harassment and Ferrellgas' subsequent investigation was as follows:

In November, 1988, on an evening when Tye was working late in the Division office Ashway entered the Division Office and grabbed Tye by the arm. [Tye at 208].

> "And one particular night that I guess was the worst was he grabbed me and on several occasions he grabbed himself but he would never really touch me except that one day at the copier and I kind of thought that that was just not going to happen. But I got up, bent over to get my purse and leave and he grabbed me by the arm and I felt terribly violated.
>
> He said that some day he would have me whether I wanted it or not and that I wasn't dead and he would show me what it was like to have sex with him, and he took me by the arm and said, you know, 'Well, this is the hottest thing in town and you'll have it whether you want it or not.' I pulled away and he went away, but I was scared all of a sudden, really frightened that, I don't know." [Tye at 208-209].

18. Tye was eventually able to push Ashway away and then she "kind of fell apart. . . .". [Tye at 210].

19. Ashway left the office. Tye stayed in the office and attempted to complete her duties. However, when she began to put the mail up she began crying. [Tye at 210].

20. At that point John Jonescu ("Jonescu"), the Phoenix Division Operations Manager, came into the office after having been on the road that day and found Tye crying in the mailroom. [Tye at 210 and Jonescu at 101].[11]

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[11] References to Jonescu's deposition, which was taken on October 14, 1988, are cited as "Jonescu" followed by the page number[s]. Excerpts of Jonescu's deposition to which this Brief cites are attached in numerical order of page number as Exhibit 11].

Q. And what did Sharon say?

A. Well, my first, her first reaction was to say it was nothing, and I said, 'Well, it has to be something, you know. You've got a problem. Is there anything I can do to help? I probably had to ask her a couple of times, and when she said Curtis had been bothering her, then I wanted to know what it was that Curtis had done to get her so upset that she was crying.

Q. And what did she say?

A. She said Curtis had been at her desk or up at her desk a number of times during that day and had related in detail his weekend, prior weekends escapades with two female companions.

Q. What else did she say?

A. Well, I asked her, you know, what else went on, and she related that Curtis, what had really made her cry was Curtis coming up and standing in front of her desk and grabbing ahold of himself and asking her how would she like a piece of the hottest action in town. [Jonescu at 104].

21. This incident was brought immediately to Hetzler's attention. [Hetzler at 59].

22. While Hetzler was being apprised of the situation Richardson walked into his office and told him that she had knowledge of the ongoing situation at the Phoenix office as well. [Hetzler at 61].

**C. The Investigation.**

23. Hetzler proceeded to discuss the situation with Tye. [Hetzler at 67].

24. During the course of their discussion Tye told Hetzler that:

> "Curt had been coming into the office when nobody else was around. . .and was telling her about his sexual conquests. . .
>
> And that she was afraid to go to Gil Johnston about it because she was afraid for her job and that if she made a big - caused a problem between the two supervisors, she would probably be let go." [Hetzler at 65].

25. Hetzler then called William Cahill ("Cahill"), Director of Personnel in Tulsa, and related the facts to Cahill as he had heard them from Richardson, Jonescu, and Tye. [Hetzler at 68-69]. Johnston also called Cahill. [Cahill Affidavit at 3].[12]

26. Upon learning of the situation Cahill contacted Tye. [Cahill at 4 and Tye at 233].

27. During this conversation Cahill informed Tye that he had been made aware of her allegations of sexual harassment by Ashway. [Cahill at 4].

28. Cahill asked Tye to explain exactly what had happened and the approximate number of times.[13] [Cahill at 4].

29. Tye was informed that providing any such information on her part was voluntary. [Cahill at 4]. Cahill asked Tye if she would be willing to make her allegations in writing. She responded "Yes, I want it stopped." [Cahill at 5; Tye at 234-235]. (A copy of Tye's letter to Cahill is

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[12] References to Cahill's Affidavit are cited as "Cahill" followed by the paragraph number[s]. Cahill's Affidavit is attached as Exhibit 12.

[13] Tye told Cahill about random incidents such as the "tongue and holding himself in front of my desk and telling me about his dates." [Tye at 234].

attached as Exhibit 13). The letter, dated November 21, 1986 provides:

> Dear Mr. Cahill,
>
> This letter is in regards to our telephone conversation this morning concerning the conduct of Curtis Ashway, Phoenix District Manager. Curtis, on many occasions has been vulgar in our Phoenix Division Office. He is much worse when both Gil Johnston, Division Manager, and John Jonescu, Operations Manager, are out of the office. I felt at first when he started this that I could take care of it myself or handle it somehow. However, the angrier I became, the worse he became. If I tried to just ignore it, he only became more sexually explicit. When I first came here to the Division office in July of this year, I didn't know Curtis at all. At first he only flirted. Then, as I was here a little longer, he became more and more personal. He was coming into the office constantly and telling me about his date the night before. I told him that I was not the least bit interested in his personal affairs. This only seemed to cause him to become more detailed about what he did on his date. (How fabulous he or she was and what sexual acts were actually committed.) When I continued to explain that I was not interested and that I thought he was sick, he said, "Doesn't this get you excited! What is the matter with you?" The visits became more and more frequent. If I locked the door between the offices, he would just stand and knock loudly on it until I opened it. These visits were starting to become regular. He started one day early in the morning dancing in front of my desk in a suggestive way and whooping and hollering. When I asked him to stop, He started telling me about the hot date he'd had with two girls at

once and how good it was and the type of sexual acts which were performed. When I told him I was busy, and to please shut up and leave, he said, "Honey, you aren't dead. I have the best in town and I could make you feel differently." I told him I was very content and did not need *HIM*! He just laughed and walked out. These probably started happening at least 3 times a week. Now, he comes in grabbing or rubbing the front of his pants and telling me that "this is the hottest thing in town, and I'm sorry if you don't want it!" I have ignored him, I have told him to stop his nonsense and grow up, I have yelled at him to leave me alone so I could work, and absolutely nothing seems to deter him. I finally became frustrated and reported it. He just will not stop - I feel as if there is some kind of conquest being taken on by him toward me. He cannot accept the fact that he does not "turn me on". He will not accept defeat and therefore he stands in front of my desk and holds himself or rubs himself and says, "I'm so horny I can't stand it." "Doesn't what I say and do get you hot?!" My constant reply is "No - Grow up!"

Sharon Tye
Phoenix Division Secretary

30. Cahill told Tye that "the Company did not condone that kind of behavior and that they would definitely further investigate the situation." [Cahill at 7 and Tye at 235].

31. During the course of the investigation into Tye's allegations Cahill learned that Susan Richardson had knowledge of various of Tye's allegations. [Cahill at 7]. Cahill asked Richardson to submit a written statement. [Cahill at 7]. [A copy of Richardson's statement is attached as Exhibit 14].

32. Richardson also submitted information regarding knowledge of similar verbal activity by Ashway towards Ms. Tammy Cooper ("Cooper"), a former Ferrellgas employee. (See Exhibit 14). As part of the investigation, Hetzler tried to locate Cooper but was unable to find her. [Hetzler at 77-78.]

33. In investigating the allegations, Cahill discussed the sexual harassment complaint individually with all supervisory personnel including Hetzler, Johnston, and Jonescu. [Cahill at 6]. In particular, Cahill asked questions pertaining to Tye's behavior, speech, and dress. The purpose was to determine if Tye's actions and/or appearance could have in any way provoked behavior such as displayed by Ashway. Each of these three individuals' responses indicated that nothing in Tye's behavior, speech, and/or dress would provoke these responses. [Cahill at 8].

34. Cahill also discussed the allegations with Bob Hundley, Area Vice President, and sought advice from the Company's corporate counsel, Mr. Mark Solano. Based upon the information provided him, Solano advised Cahill to terminate Ashway because of the Company's potential exposure under Title VII. [Cahill at 8 and 9].

35. Based on the verbal information received and the actual written complaint submitted by Tye, Cahill, Hetzler and Hundley believed the allegations were true regarding Ashway. [Cahill at 8]. Thus, based on the advice of counsel, a decision was made to terminate Ashway unless he created a doubt in Hetzler's mind when he confronted Ashway. [Cahill at 10].

36. Hetzler was given final authority to decide whether or not Ashway should be terminated based on Ashway's response when he was confronted on December 1, 1986. [Cahill at 10 and Hetzler at 80 and 85]. Specifically, if Ashway could say or do nothing that would change the course of events during the course of Hetzler's upcoming

meeting with him on December 1, 1986, he would not be terminated. [Hetzler at 82 - 85].[14]

37. On December 1, Johnston and Hetzler met with Ashway in Johnston's office at the Division Offices. [A memorandum from Hetzler to Hundley regarding the meeting with Ashway is attached as Exhibit 15].

38. During the course of this meeting, Ashway was presented with a copy of Tye's statement. [Ashway at 42-43 and Exhibit 13].

39. Ashway denied the allegations. [Hetzler at 86].

40. Ashway was unable to offer any explanation for his actions. [Hetzler at 86]. Furthermore he was unable to suggest the names of other Ferrellgas employees who could support his denial of the sexual harassment allegations or who Hetzler could question regarding those allegations. [Ashway at 72]. After Ashway was given an opportunity to read Tye's statement, Hetzler questioned him regarding specific allegations contained therein. [Hetzler at 101].

> Q. By Ms. Dessaint: I'm asking you if you recall the point in the conversation where you read Curt a quote from the letter and asked him if he had, in fact, said that particular statement.
>
> A. I remember having done that, yes. It was after he had had a chance to read the entire letter and we had talked on some concerning the allegation.

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[14] Ashway claims that the decision was final with respect to his termination because his final paycheck was dated November 25, 1986. [Ashway at 175]. Although the check was dated November 25, 1986 it was dated as such in accordance with Company policy, *i.e.* if an individual is to be terminated the Company will present them with a check at that time. However, merely because a check is prepared does not mean that a *final* decision to terminate has been made. [Hetzler at 83-4].

Q. Do you recall what particular quote you asked him about?

A. It was about the touching himself quote. If he had really done that.[15]

Q. And it says [referring to the memo from Hetzler to Hundley] that he stated he did not make that statement and you have got, "From the look on Curtis' fact, it would be very difficult to believe that he did not make that statement."

What was it about it, about the look on Curtis' face that you didn't believe?

Q. Well, it's kind of like making a judgment call on anything else. At that point in time taking into account the situation, by looking at Curt, looking at his face, looking at his eyes, I didn't believe what he was saying. No more than anyone else does in a similar type situation. [Hetzler at 101-102].

41. Hetzler determined at the meeting that Ashway was lying. Ashway was unable to offer any supporting evidence on his behalf. Hetzler then told Ashway to either submit his resignation or he would be terminated. [Hetzler at 86].

42. Ashway never asked Hetzler's supervisor to review the situation. [Ashway at 79]. Ashway never sought a review of his termination from any corporate personnel. [Ashway at 79].

43. As a result of his termination, Ashway sued Ferrellgas for, among other things, loss of future wages and

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[15] The touching himself quote to which Hetzler refers is as follows: "Now he comes in grabbing or rubbing the front of his pants and telling me that 'this is the hottest thing in town and I'm sorry if you don't want it!' " [See Exhibit 13].

benefits. [See Ashway's Answer to Defendant's Opening Interrogatories to Plaintiff number 24, attached as Exhibit 16].

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this ___ day of December, 1988, to:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

86 Civ. 1643(RJD)

EDWARD STOCKLEY,

Plaintiff,

v.

AT&T INFORMATION SYSTEMS, INC.,

Defendant.

# BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

## STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is the agency established by Congress to administer, interpret, and enforce Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. 2000e *et seq.*, and other federal fair employment practice laws.

In this case, plaintiff Edward Stockley alleges that statements made about him in the course of defendant's investigation of a complaint of sexual harassment constitute defamation. The EEOC believes that the defendant's investigation was required by Title VII and by the Commission's Sexual Harassment Guidelines, 29 C.F.R. §1604.11. Because our interest in eliminating employment discrimination will be undermined if investigations such as this subject an employer to suit, we offer our views to the Court.

## ISSUE PRESENTED

Whether a qualified privilege should be accorded to statements made by an employer in the course of an investigation, required by Title VII, of a sexual harassment complaint.

## STATEMENT OF FACTS

Plaintiff Edward Stockley was a supervisory employee of Defendant AT&T Information Systems, Inc. ("AT&T"), with responsibility for customer sales and service training at its Jericho, New York business office. (Second Amended Complaint at ¶3). In February of 1985, a female former employee, who had been a trainee in the Jericho office, complained in writing to AT&T that Stockley had sexually harassed her. (*Id.* at ¶6). Thereafter, an investigatory group led by John McCormack, AT&T Staff Manager for Equal Employment Opportunity, interviewed employees at the Jericho office who gave accounts of offensive language and unwelcome touching by Stockley. (Defendant's Response to Plaintiff's First Request for Production, Exhibit D).

In his investigative report, McCormack concluded, *inter alia*, that an "offensive atmosphere of sexual commentary" existed in the Jericho office; that employees felt intimidated by the environment generated by Stockley; that Stockley's actions forced the complaining trainee to resign; and that the Company could be held liable for Stockley's actions. (Defendant's Response to Plaintiff's First Request for Production, Exhibit D). Region Manager Richard White, along with other superiors of Stockley, reviewed the investigative report, and thereafter disciplined him. The nature and extent of the discipline was set forth in a memorandum to Stockley's personnel file which stated, *inter alia*, that he was "unprofessional," that he "used poor judgment as a supervisor," and that he was "a leader in sexual kidding and sexual verbalization throughout the office." (Second Amended Complaint, Exhibit B).

In the course of AT&T's investigation, upper-level officials, including the Area Manager, Region Personnel Director, Vice President for Personnel and Labor Relations, and Vice-President for Sales and Service (Northeast), were made privy to the allegations against Stockley. (Second Amended Complaint, Exhibit B; Defendant's Response to Plaintiff's Interrogatories, Nos. 6-15). In addition, a three-person Ad Hoc Committee was appointed to review the investigation and ensure that the discipline meted out to Stockley was appropriate. (Defendant's Response to Plaintiff's Interrogatories, Nos. 1-3). As part of this discipline, Stockley was transferred to another office. (Second Amended complaint, Exhibit B). He alleges that employees there knew of the reason for his reassignment. (Plaintiff's Supplemental Response to Defendant's Interrogatory, No. 6). In the fall of 1985, he resigned from AT&T, and in 1986 he brought this lawsuit seeking two million dollars in damages. (Defendant's Response to Plaintiff's Interrogatory, No. 20; Second Amended Complaint at ¶23 and ¶40).

**SINCE AT&T'S INVESTIGATION OF SEXUAL HARASSMENT ALLEGATIONS WAS REQUIRED BY TITLE VII, STATEMENTS MADE IN THE COURSE OF THAT INVESTIGATION SHOULD BE ACCORDED A QUALIFIED PRIVILEGE.**

AT&T had a clear duty under controlling case law, and under the Commission's guidelines, to investigate the charges against Edward Stockley. We believe that federal policy considerations require that statements made in the course of such an investigation be accorded a qualified privilege. On the facts of this case, since the qualified privilege has not been abused, judgment should be rendered for AT&T.

1. In *Meritor Savings Bank* v. *Vinson*, ___ U.S. ___, 106 S. Ct. 2399, 2405-06 (1986), the Supreme Court held that a Title VII violation may be established "by proving

that discrimination based on sex has created a hostile or abusive work environment." The Court made clear that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," 106 S. Ct. at 2405.

The *Vinson* decision confirms prevailing case law holding an employer liable for failing to remedy known hostile or offensive work environments. *See, e.g., Bundy* v. *Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); *Tomkins* v. *Public Service Electric & Gas Co.*, 568 F.2d 1044, 1049 (3rd Cir. 1977) (Title VII is violated when, *inter alia*, an employer does not take prompt and appropriate remedial action after acquiring knowledge of sexual harassment); *Henson* v. *City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (employer may violate Title VII if it fails to take prompt remedial action after it knew or should have known of the sexual harassment); *Munford* v. *James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977) (an employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel—"failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior").[1]

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[1] The employer's affirmative duty was first enunciated in cases of harassment on the basis of race and national origin. *See, e.g., United States* v. *City of Buffalo*, 457 F. Supp. 612, 632-635 (W.D. N.Y. 1978), *modified in part*, 633 F.2d 643 (2nd Cir. 1980) (employer violated Title VII by failing to issue strong policy directive against racial slurs and harassment of black police officers, to conduct full investigations, and to take appropriate disciplinary action); *EEOC* v. *Murphy Motor Freight Lines*, 488 F. Supp. 381, 385-386 (D. Minn. 1980) (defendant violated Title VII because supervisors knew or should have known of co-workers' harassment of black employees, but took inadequate steps to eliminate it).

The employer's duty to act is also delineated in the EEOC's guidelines on sexual harassment which provide that an employer should:

> take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. §1604.11(f).

In the instant case, there can be no doubt that AT&T had a legal duty to investigate the accusations against Mr. Stockley. Had it responded to them with neglect, indifference, or willful ignorance, AT&T would have violated Title VII. Instead, faced with allegations of a hostile working environment, the company did exactly what the law requires.

2. Federal policy considerations require that statements made by an employer in the course of fulfilling its affirmative duty to investigate a complaint of sexual harassment—such as those made here—be accorded a qualified privilege.[2] This is the conclusion of the first federal court of appeals to have addressed this question. *Garziano* v. *E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 387-88 (5th Cir. 1987). In *Garziano*, the court held that a company bulletin announcing the company's sexual harassment policy and referring to the incident for which plaintiff was fired was protected by a qualified privilege. The court

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[2] Statements made within the scope of a qualified privilege are not actionable if made without malice. A qualified privilege can be overcome only by a showing that publication was made with personal spite, ill will, or culpable recklessness or negligence. *Perfect Fit Industries* v. *Acme Quilting Co.*, 494 F. Supp. 505, 507 (S.D.N.Y. 1980).

reasoned that the bulletin was privileged not only as a business communication under state law, but also as a communication in furtherance of the employer's duty under federal law "to protect the workplace and the workers from sexual harassment, including redressing known occurrences of sexual harassment." 818 F.2d at 387.[3]

Similarly, a Commonwealth of Massachusetts Appellate Division court has recognized a privilege where the "exclusive avenue" for avoidance of liability by the employer was "the prompt institution of all necessary, corrective action, including an immediate investigation of [sexual harassment] charges made." *DiSilva* v. *Polaroid Corp.*, No. 8828, slip op. at 8 (Mass. App. Div. Jan. 4, 1984).[4] In the *DiSilva* case, the court ruled that all statements made by the employer in the course of its investigation of a sexual harassment complaint were protected by a qualified privilege derived from state law and from the employer's affirmative legal duty under Title VII. *Id.* at 9.

3. In the instant case, there is no evidence that AT&T acted so as to defeat its qualified privilege. It is clear that AT&T did no more than it was reasonably required to do in response to the allegations of sexual harassment. The accusations against Mr. Stockley were repeated only insofar as necessary to complete the Company's investigation and to impose appropriate discipline.[5] Moreover, there is no evidence that any of the small group of management

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[3] In furtherance of national labor policy, Courts have accorded an absolute privilege to statements made in the course of grievance and collective bargaining procedures. *General Motors* v. *Mendicki*, 367 F.2d 66 (10th Cir. 1966); *Brooks* v. *Solomon Co.*, 542 F. Supp. 1229 (N.D. Ala. 1982).

[4] A copy of the *DiSilva* decision is appended to this brief.

[5] In *Garziano*, the court found that publication of the alleged defamation to 140 supervisors was protected by a qualified privilege. 818 F.2d at 384, 386. Here, of course, the number of persons told of the charges is much smaller. *See supra* at 2-3.

officials made privy to the charges acted with malice or bad faith.

## CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment should be granted.

Respectfully submitted,

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